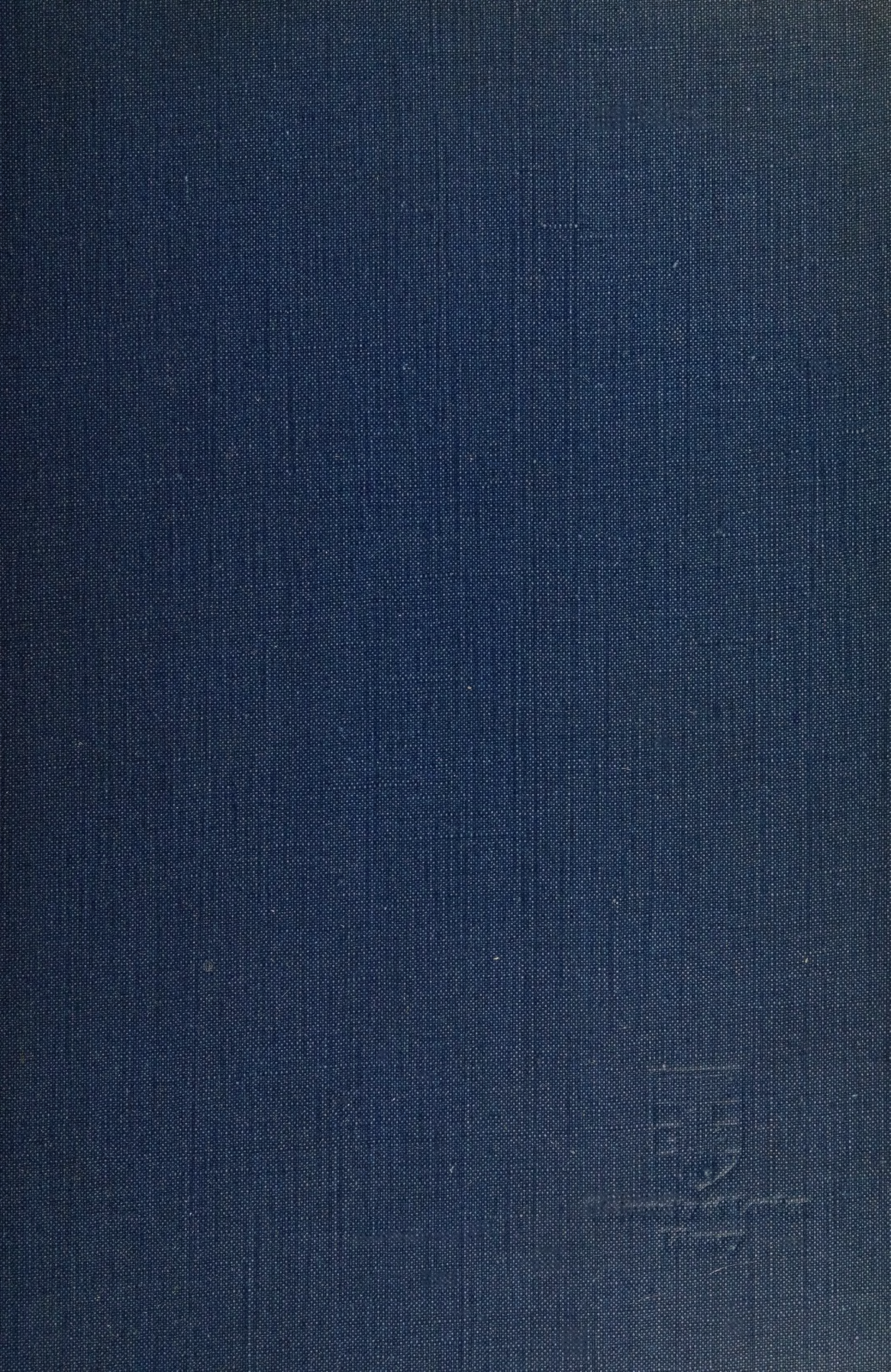
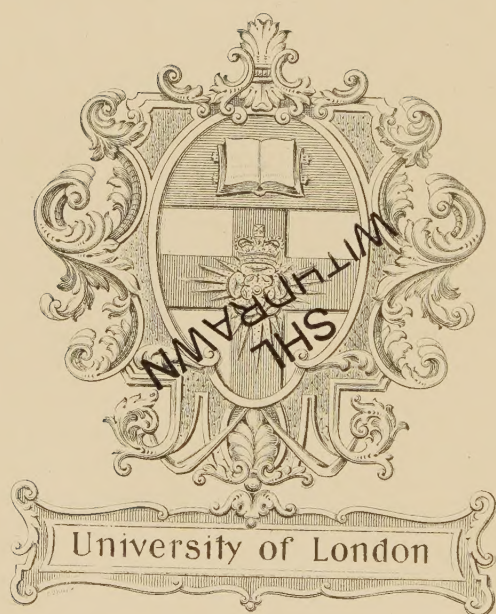








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THE INNER HISTORY OF THE DECLARATION OF PARIS

By H. W. MALKIN, C.B., C.M.G.

“ LES Plénipotentiaires qui ont signé le Traité de Paris du 30 Mars 1856, réunis en Conférence,

Considérant :

Que le droit maritime, en temps de guerre, a été pendant longtemps l'objet de contestations regrettables ;

Que l'incertitude du droit et des devoirs en pareille matière, donne lieu, entre les neutres et les belligérants, à des divergences d'opinion qui peuvent faire naître des difficultés sérieuses et même des conflits ;

Qu'il y a avantage, par conséquent, à établir une doctrine uniforme sur un point aussi important ;

Que les Plénipotentiaires assemblés au Congrès de Paris ne sauraient mieux répondre aux intentions dont Leurs Gouvernements sont animés, qu'en cherchant à introduire dans les rapports internationaux des principes fixes à cet égard ;

Dûment autorisés, les Susdits Plénipotentiaires sont convenus de se concerter sur les moyens d'atteindre ce but, et, étant tombés d'accord, ont arrêté la Déclaration solennelle ci-après :

1. La Course est et demeure abolie ;
2. Le pavillon neutre couvre la marchandise ennemie, à l'exception de la contrebande de guerre ;
3. La Marchandise neutre, à l'exception de la contrebande de guerre, n'est pas saisissable sous pavillon ennemi ;
4. Les blocus, pour être obligatoires, doivent être effectifs, c'est-à-dire, maintenus par une force suffisante pour interdire réellement l'accès du littoral de l'ennemi.

Les Gouvernements des Plénipotentiaires soussignés s'engagent à porter cette Déclaration à la connaissance des Etats qui n'ont pas été appelés à participer au Congrès de Paris et à les inviter à y accéder.

Convaincus que les maximes qu'ils viennent de proclamer ne sauraient être accueillies qu'avec gratitude par le monde entier, les Plénipotentiaires soussignés ne doutent pas que les efforts de

leurs Gouvernements pour en généraliser l'adoption, ne soient couronnés d'un plein succès.

La présente Déclaration n'est et ne sera obligatoire qu'entre les Puissances qui y ont ou qui y auront accédé.

Fait à Paris, le 16 Avril 1856.

(L.S.) BUOL-SCHAUENSTEIN
 (L.S.) HUBNER
 (L.S.) A. WALEWSKI
 (L.S.) BOURQUENEY
 (L.S.) CLARENDON
 (L.S.) COWLEY
 (L.S.) MANTEUFFEL
 (L.S.) HATZFELDT
 (L.S.) ORLOFF
 (L.S.) BRUNNOW
 (L.S.) C. CAVOUR
 (L.S.) DE VILLAMARINA
 (L.S.) AALI
 (L.S.) MEHEMMED DJEMIL.”¹

The Declaration of Paris was the first and remains the most important international instrument regulating the rights of belligerents and neutrals at sea which received something like universal acceptance. It settled the age-long controversy as to the position of enemy goods on a neutral ship and neutral goods under an enemy flag, and the settlement involved the abandonment of the traditional British claim to make prize of the former. The events of the recent war naturally caused a revival of interest in the history of the Declaration, and such interest, particularly in the case of British writers, was especially directed to this abandonment of an important belligerent right, so much so that there has been a tendency to lose sight of the other provisions of the Declaration and to fail to consider its effect as a whole. It is for this reason that the full text of the Declaration has been printed at the head of this article.

In spite of all that has been written on the subject of the Declaration, singularly little has hitherto been publicly known as to the history of its origin, and especially as to the motives which

¹ *State Papers*, Vol. 46, p. 26. The text printed above is taken from the certified copy of the Declaration in the Record Office. The text in the State Papers contains a considerable number of small mistakes.

induced the British Government of the day to accept it. In 1919 the available material was made the subject of an exhaustive survey by the late Sir Francis Piggott,¹ of which full use will be made in the present article ; but, while his book is essential to any study of the subject, it does not really answer the historical question as to the reasons which led Lord Palmerston and his colleagues to the conclusion that the acceptance of the Declaration was in the best interests of their country. The reason for this is perhaps twofold ; in the first place both the documentation and comment are so copious that the reader finds it difficult to see the wood for the trees ; and in the second, although Sir Francis was given access to some then unpublished documents in the Record Office, there is some important material² in existence which was not available to him, with the result that in some cases he can only admit that there is no evidence as to what took place,³ while the absence of this information tends to affect his whole attitude as to the question in general and the action of the British Government of the day in particular. It is thought therefore that there may be room for a study which will take into account all the relevant material which exists, and will endeavour to trace the considerations which were present to the minds of Lord Palmerston and his colleagues.

Although Great Britain did not declare war against Russia until March 28, 1854, it seemed obvious in the preceding January that an outbreak of hostilities was unavoidable. Russia and Turkey had been at war since October, and diplomatic relations between Russia and France and Great Britain were in fact suspended early in February. In these circumstances the two Baltic Powers, Sweden and Denmark, thought it necessary to state the position which they intended to take up in the event of a maritime war, and on January 2, 1854, their representatives presented notes in identic terms to Lord Clarendon, the British Secretary of State for Foreign Affairs. Similar communications were made at Paris and St. Petersburg, and notes in almost identical terms were addressed to the Government of the United States and to

¹ *The Declaration of Paris, 1856*, by Sir Francis Piggott ; University of London Press, 1919. The book is referred to in this article as "Piggott," and in the case of published documents a reference is given to the page where they are printed in Piggott, as well as to the official publication.

² This consists of (i) the Reports of the Law Officers of the Crown addressed to the Foreign Office during the Crimean War, (ii) certain documents of April, 1856. (i) are now available in the Record Office ; as to (ii), see pp. 26, 30, *infra*.

³ See, e. g. Piggott, pp. 116, 122.

the other Powers who might be expected to be neutral. The Swedish note to Great Britain was as follows :¹

“ LONDRES, le 2 Janvier 1854.

Les complications politiques du moment, à la suite de la déclaration de guerre de la Porte Ottomane, et l'éventualité possible d'une guerre maritime, ont imposé au Gouvernement de Sa Majesté le Roi de Suède et de Norvège l'obligation de vouer une attention sérieuse aux effets qui pourraient en résulter. Son désir sincère est de conserver intactes les relations de bonne amitié et de parfaite intelligence qui règnent si heureusement entre les Royaumes Unis et tous les Gouvernements de l'Europe. N'ayant rien de plus à cœur que de maintenir et de cimenter ces relations, Sa Majesté le Roi de Suède et de Norvège regarde comme un devoir de ne point laisser ignorer aux Puissances amies et alliées la marche politique que, pour y parvenir, elle se propose de suivre dans l'éventualité ci-dessus mentionnée.

Guidée autant par la franche amitié qui règne entre les Souverains et les peuples des Royaumes Unis et du Danemarck, que par cette communauté d'intérêts et de principes politiques qui se soutient et se renforce réciproquement, Sa Majesté le Roi de Suède et de Norvège s'est vue appelée, en premier lieu, à se concerter avec son auguste ami, voisin et allié, Sa Majesté le Roi de Danemarck, sur les mesures à adopter éventuellement, afin d'établir une action commune, propre à faciliter par son identité l'application du système convenu. Ces ouvertures ayant trouvé l'accueil favorable, auquel on était en droit de s'attendre, c'est en conformité des résolutions arrêtées par les deux Souverains, que le Soussigné, Envoyé Extraordinaire et Ministre Plénipotentiaire de Sa Majesté le Roi de Suède et de Norvège près Sa Majesté la Reine de la Grande Bretagne et d'Irlande, a reçu l'ordre de son auguste Souverain de porter à la connaissance du Ministère de Sa Majesté Britannique les règles générales que Sa Majesté le Roi de Suède et de Norvège a cru devoir établir, afin de fixer la position de ses Etats pour le cas déplorable que des hostilités entre les Puissances amies et alliées du Roi vinssent à éclater.

Le système que Sa Majesté le Roi de Suède et Norvège entend suivre et appliquer invariablement est celui d'une stricte neutralité, fondée sur la loyauté, l'impartialité et un égal respect pour les droits de toutes les Puissances. Cette neutralité, selon les vues uniformes des deux Cours, imposerait au Gouvernement de Sa

¹ *State Papers*, Vol. 44, p. 94. Piggott, p. 223.

Majesté le Roi de Suède et de Norvège les obligations et lui assurerait les avantages suivants :

1. De s'abstenir, pendant la lutte qui pourrait s'engager, de toute participation, directe ou indirecte, en faveur d'une des Parties Contendantes au détriment de l'autre ;

2. D'admettre dans les ports de Suède et de Norvège les bâtiments de guerre et de commerce des parties belligérantes ; le Gouvernement se réservant toutefois la faculté d'interdire aux premiers l'entrée des ports de guerre suivants, savoir : celui de Stockholm, en deçà de la forteresse de Waxholm ; de Christiania, en deçà du fort de Kaholm ; le bassin intérieur de la station militaire Norvégienne à Horten ; les ports de Carlsten et de Carlskrona, en deçà des fortifications ; et le port de Slitö, dans l'île de Gottland, en deçà des batteries élevées à Enchholm.

Les règlements sanitaires et de police que les circonstances auraient rendu ou pourraient rendre nécessaires, devront naturellement être observés et respectés. Les corsaires ne seront pas admis dans les ports, ni tolérés sur les rades des Etats de Sa Majesté le Roi de Suède et de Norvège ;

3. D'accorder aux bâtiments des Puissances belligérantes la faculté de se pourvoir dans les ports des Royaumes Unis de toutes les denrées et marchandises dont ils pourraient avoir besoin, à l'exception des articles réputés contrebande de guerre ;

4. D'exclure des ports de Suède et de Norvège l'entrée — les cas de détresse constatée exceptés — la condamnation et la vente de toute prise ; et enfin,

5. De jouir, dans les relations commerciales des Royaumes Unis avec les pays en guerre, de toute sûreté et de toutes les facilités pour les navires Suédois et Norvégiens, ainsi que pour leurs cargaisons, avec l'obligation toutefois pour ces navires de se conformer aux règles généralement établies et reconnues pour les cas spéciaux de blocus déclarés et effectifs.

Tels sont les principes généraux de la neutralité adoptée par Sa Majesté le Roi de Suède et de Norvège pour le cas qu'une guerre en Europe viendrait à éclater. Le Roi se flatte qu'ils seront reconnus conformes aux droits des gens, et que leur loyale et fidèle observation mettra Sa Majesté et état de cultiver avec les Puissances amies et alliés ces relations que, pour le bien de ses peuples, il lui tient à cœur de préserver de toute interruption.

En priant Lord Clarendon de vouloir bien porter la présente

communication à la connaissance du Gouvernement de Sa Majesté Britannique, le Soussigné, &c.

REHAUSEN.

The Earl of Clarendon."

Sir Francis Piggott, with paragraphs 2 and 3 of the Declaration of Paris always in mind, regards this communication as "an ultimatum with the familiar burden 'respect for the neutral flag.'"¹ But it seems very doubtful whether such was at any rate the main intention of the two governments, and it is in any case reasonably clear that their communication was not so regarded by the British Government. It is true that there had been some discussion at Stockholm as to the principle that the neutral flag covers enemy goods and there was some reason to believe that the two governments were in communication with the United States on the subject,² but the traditional attitude of the two Baltic states as to the rights of the neutral flag was familiar, and what the future Allies really wanted to know (it being settled that the two states would remain neutral, which was in itself something gained) was the attitude which they were going to adopt in relation to two matters which would be of great importance in the event of war—the opening of their ports to belligerent warships and the admission thereto of privateers.

It was obvious that in the event of a naval war in the Baltic the closing of Swedish and Danish ports to belligerent warships would be of great assistance to Russia, and there was reason to fear that Russian influence on the two states was such that a decision which would be unfavourable to Russia was unlikely. It was reported in fact that Russia was demanding that Swedish ports should remain open to her warships, while closed to those of England and France, or alternatively that they should be closed to all belligerents, or that she should be entitled to use two Swedish ports which should be closed to her enemies.³ As regards privateers, it is easy to understand the importance which the British naval authorities must have attached to the treatment to be accorded to them. The privateer was then, like the submarine in modern times, the weapon of the weaker naval Power, and even after Trafalgar the depredations which French privateers had inflicted on British commerce were sufficiently serious.⁴ The

¹ Piggott, p. 6.

² *Ibid.*, pp. 7–8.

³ *Ibid.*, pp. 10–12.

⁴ See Mahan, *The Influence of Sea Power upon the French Revolution and Empire*, Vol. II, pp. 207–14. Mahan estimates the annual percentages of war losses in the

superiority of the combined British and French fleets over the Russian navy was so great that they could count on the command of the sea, but, if Russian privateers were to be allowed to make use of neutral ports, the sea-borne commerce of the Allies was bound to suffer. Already a report was current that Russia had been endeavouring to obtain the consent of the United States to the issue of Russian letters of marque to American citizens,¹ and we shall see that the question of privateering was continually recurring during the war and had assumed great prominence when the proposal which resulted in the Declaration of Paris came before the British Government. Now from both these points of view the announcement made by the two Baltic states was eminently satisfactory. The warships and merchant vessels of the belligerents were to be admitted to Swedish and Danish ports, subject to a right to close parts of certain harbours, and allowed to take in those ports all forms of supplies other than contraband, while privateers were not to be admitted at all. In comparison with these advantages, the restatement of the traditional views of the northern neutrals as to the capture of enemy goods under a neutral flag, if such was indeed the intention of paragraph 5 of the note, may well have seemed a small thing.

In point of fact, however, it can be shown that either paragraph 5 was not so interpreted, or, if it was, it was not considered necessary to take specific notice of it. On the receipt of the Swedish and Danish notes they were referred by the Foreign Office to the Queen's Advocate, Sir John Harding, with a request that he would report whether in his opinion anything was wanting in these notes to constitute complete neutrality and make any general remarks which he might have to offer on the subject. As the office of Queen's Advocate (or, more fully, "Her Majesty's Advocate General") has now ceased to exist, it may be convenient to mention that he was "the principal law officer of Her Majesty in the College of Advocates at Doctors' Commons and in the Admiralty and Ecclesiastical Courts . . . Before the High Court of Delegates and at the Bar of the Privy Council . . . the Advocate General took precedence of the Attorney General and Solicitor General, and in cases laid by the Crown before the three Law Officers for their opinion the Advocate General had the precedence. . . . It was the practice that . . . in all international and

British mercantile marine as having gradually diminished from a little over 3 per cent. in 1795 to 2½ per cent. in 1810 (p. 226). At any rate after Trafalgar, the bulk of these losses must have been due to privateers. See p. 30, *infra*.

¹ Piggott, p. 8.

ecclesiastical questions his opinion should be taken either with or without the Law Officers of the Crown. He was specially consulted by the Foreign Office.”¹

The Queen’s Advocate’s report was as follows :

“ DOCTORS’ COMMONS, January 11, 1854.

My Lord,

I am honoured with your Lordship’s commands signified in Mr. Addington’s letter of the 4th instant, stating that he was directed to transmit to me two identic notes which have been delivered to him by the Representatives of Sweden and Denmark, announcing the policy which the two countries have agreed to adopt in the event of war ; and to request that I would take these notes into consideration, and report to your Lordships, at my earliest convenience, whether in my opinion anything is wanting in these notes to constitute complete neutrality, and that I would at the same time report to your Lordship any general remarks I may have to offer on the subject.

In obedience to your Lordship’s commands I have the honour to report :

That I do not observe anything is wanting in these notes to constitute complete neutrality according to international law.

That, agreeably to your Lordship’s request, I would venture to remark generally thereupon :

1. That the proposed admission of the ships of war of both belligerents into the harbours of these neutral countries is open to this observation, viz. that the practical effect of this will be that such harbours when fortified, e. g. Copenhagen, will (in effect) prove an asylum and protection for the fleets or vessels of that belligerent Power which may first enter, and which cannot be attacked therein with impunity ; but that such neutral harbours, when undefended by fortifications, will not in practice protect the vessels of one belligerent from the attacks of those of the other, although legally the limit of three miles from the shore ought to protect them.

2. That there may possibly be some harbours, the entry into which being either interdicted or permitted to both parties, may operate greatly to the advantage of one belligerent and to the detriment of the other, for topographical or military reasons, and that in this view it is possible that some alterations in the list of interdicted harbours may be usefully suggested. I would venture,

¹ *Encyclopædia of the Laws of England*, Vol. I, pp. 225–6.

with the utmost diffidence, to suggest whether (for instance) a Russian fleet by getting first into Copenhagen (which is not an interdicted harbour) might not thereby obtain a decisive or most important advantage, as by making it impossible for Her Majesty's ships to enter or quit the Baltic without great danger, and if so, whether the Danish Government might not be induced to interdict Copenhagen to both parties. These, however, are political and military rather than legal questions, and beyond my province, and it is quite possible that the practical result may be in favour of Great Britain.

3. It may be expedient to come to some more distinct understanding as to what articles are meant to be included in the term contraband of war. For want of this, cargoes of an ambiguous nature, as timber and coal (for instance), may under certain circumstances cause much difficulty. I observe that such articles were enumerated in an explanatory Article or Declaration signed at Copenhagen, 4th July, 1780, and renewed in Article VII of the Treaty of Kiel, 1814 (1 Hertslet, p. 203).

4. The interdiction as regards privateers, though somewhat novel, is not, I presume, deemed objectionable as being prejudicial to British, or favourable to Russian, interests.

5. It is possible that under the words of the Vth Article—"toute sureté et toute facilité pour les navires Danois, Suédois, et Norvégiens, avec leurs cargaisons"—some attempt may be made to contend that "the flag covers the cargo," or even to reopen the point (formerly so much disputed) as to the right of searching neutrals when under convoy. If there be any such idea, some declaration on the part of Her Majesty's Government would be advisable.

I need not, perhaps, at present further advert to such eventualities, nor do more than refer to my report dated November 22nd, 1853 (on the notice from the Russian Finance Minister),¹ especially to the conclusion of that report, and to the very different practice which it is probable will be adopted by Russia and Great Britain as to neutral goods when captured on board unarmed merchant-vessels of a belligerent, with a view to entering into some such common course of action with other neutral Powers as I have therein ventured to suggest, and for which these identic notes may possibly afford a favourable opportunity.

(Signed) J. D. HARDING."

¹ This was a notice announcing, *inter alia*, that Russia would adopt the principle "enemy ships, enemy goods."

It is interesting to note in passing the low opinion which the Queen's Advocate had of the degree of protection against attack afforded to a belligerent fleet by a neutral port, but the important part of his opinion is the paragraph numbered 5, from which it appears that he was not at all clear whether the passage in question was to be regarded as a statement of the contention that "the flag covers the cargo." The two notes, with the Queen's Advocate's opinion, were then sent by Lord Clarendon to the Lord Chancellor, Lord Cranworth; his reply¹ did not mention paragraph 5 at all, and said that "the course of conduct which Sweden and Denmark prescribe for themselves will be one of perfect neutrality and one of which we cannot complain. I doubt whether in such circumstances it would be wise to ask these states to modify the regulations which they have proposed for themselves." More than half his letter deals with the question of getting the two states to "treat coal as contraband of war."

Accordingly, after consultation with the naval authorities,² a reply was sent on January 20 to the Swedish (and Danish) Governments expressing "the satisfaction with which Her Majesty's Government have learned the neutral policy which it is the intention of the Swedish and Norwegian Government to pursue and the measures adopted for giving effect to that policy," and stating that "Her Majesty's Government will lend their best endeavours in support of the neutral position that Sweden and Norway propose to maintain."³

It was none the less apparent that an agreement must speedily be come to between Great Britain and France as to the rules to be adopted, in the event of war, with regard to the treatment of neutral property and ships. But before turning to the discussion which took place on this subject, it will be convenient to deal with the episode of the "Riga dispatch." The only importance of this episode in the present connexion is that it is possible, as Sir Francis Piggott does,⁴ to regard the attitude adopted in the Riga dispatch as inconsistent with the reply returned to the Swedish and Danish communications, and also as indicating divided counsels within Her Majesty's Government, and it is therefore worth while to show that this is not the case.

The Baltic trade with Great Britain was largely in the hands

¹ Piggott, p. 16.

² The fact that the naval authorities were consulted was expressly stated by Lord Clarendon in the House of Lords on February 10 (*ibid.*).

³ *State Papers*, Vol. 44, pp. 97, 98. Piggott, pp. 225 and 227.

⁴ pp. 42 and 55.

of British merchants established in Riga and other Russian ports, and, when the likelihood of war between Great Britain and Russia became apparent, these merchants naturally became uneasy as to their position. On January 26 the British consul at Riga forwarded ¹ to the Foreign Office a letter from the English firm of Mitchell & Co. of that city requesting "to be informed what respect would be paid by British cruisers in the event of war to bona fide British property the produce of Russia, if shipped on neutral vessels." The dispatch was referred to the Queen's Advocate for his advice as to the answer to be returned. His report was as follows :

" DOCTORS' COMMONS, February 7, 1854.

My Lord,

I am honoured with your Lordship's commands signified in Mr. Addington's letter of the 3rd instant, stating that he was directed to transmit to me the accompanying dispatch from Mr. Lousada, Her Majesty's Consul at Riga, inclosing copy of a letter from Messrs. Mitchell and Co., of that city, requesting to be informed what respect would be paid by British cruisers in the event of war to *bonâ fide* British property, the produce of Russia, if shipped on neutral vessels ; and Mr. Addington is pleased to request that I would take this subject into consideration and report to your Lordship at my earliest convenience, my opinion as to the answer which it will be proper to return to the inquiry of Messrs. Mitchell and Co.

In obedience to your Lordship's commands I have taken the subject into consideration, and have the honour to report—

That I am of opinion that property of the description in question, the produce of Russia, and exported therefrom, by, and on account of, a British merchant, domiciled and trading there, although purchased before the war, and exported to England, would not be respected by Her Majesty's cruisers unless in pursuance of a licence, or of some special instructions from Her Majesty to the officers of Her navy. I would beg leave to refer to my report on Mr. Huddleston's case (of January 13, 1854), and to add that by the law and practice of nations, a belligerent has a right to consider as enemies all persons residing in a hostile country, or who maintain commercial establishments therein, whether such persons be by birth neutrals, allies, enemies, or fellow subjects ; the property of such persons, exported from such country, is, therefore, *res hostium*, and as such, lawful prize

¹ *State Papers*, Vol. 44, p. 105.

of war. Such property will be condemned as prize although its owner may be a native-born subject of the captor's country, and although it may be *in transitu* to that country, and its being laden on board a neutral ship will not protect the property. It can only be protected from *capture* by licence; it may be released and restored by the Crown at any time before final *condemnation*, but not afterwards. *The sloop Cornelis*, 1 C. Robinson, p. 196, *Potts v. Bell*, 8 Term Reports, p. 548, the *Francis*, 8 Cranch, contain the clearest exposition and application of the law of nations on this subject.

Unless, therefore, Her Majesty's Government should consider that this is a proper case for the granting of a license, or should consider that this property, if actually captured ought to be restored, Messrs. Mitchell must be informed that the property in question will not be protected by the Consular certificate, or by any other document, but will be liable to capture and condemnation as prize.

I observe that although Messrs. Mitchell state that it is not their intention to enter into fresh export business, they indicate no intention of giving up their commercial establishment or trade, or of returning with their property to England in the event of war.

(Signed) J. D. HARDING.

PS. I ought, perhaps to add that a license from Her Majesty will not protect the property from capture by the allies of Her Majesty.

(Intd.) J. D. H."

This reply was promptly turned into the form of a dispatch to the consul, which was sent on February 16.¹ It is obvious that the Queen's Advocate's opinion was simply a statement of the existing law as laid down in the English prize decisions as to enemy character; this was the substantial point which arose on the Riga inquiry, and the reference to the liability of enemy property to capture on a neutral ship is only incidental. It is clear that the British Government did not regard their reply to the Swedish and Danish communications as committing themselves to the acceptance of any doctrines as to prize law which might be regarded as latent in the notes in question, and the Queen's Advocate obviously found nothing in the correspondence in question which rendered it undesirable for him to advise on the hypothesis that the existing rules of prize law as understood in

¹ *State Papers*, Vol. 44, p. 106. Piggott, p. 230.

England would be applied. No decision as to any possible modifications of those rules for the purpose of the war had as yet been reached, and there is nothing to suggest that any question of principle was considered, in connexion with the Riga dispatch, at all.

It was obvious, however, that a decision about the rules to be applied by the Allies would be essential. In the event of war the French and British fleets would be co-operating, not only in hostile action against the enemy, but in the exercise of belligerent rights over private property at sea. But there was between the practice and prize law of the two countries a fundamental difference; the British captured enemy goods on a neutral ship but released neutral goods on an enemy ship, while the French made prize of neutral goods on an enemy ship but did not capture enemy goods under the neutral flag; in other words, for the French the test was the flag, for the British the nationality of the goods. It is unnecessary to trace here the well-known history of this divergence, but its existence was of course well known, and it was clear that, if each of two fleets operating together were to apply rules different from those on which the other acted, the result would be chaos; no neutral trader would know where he stood, and the neutral states (whose good will, or at any rate absence of ill will, was, as has been seen above, important to the Allies) would have justifiable cause for complaint.¹ Further, if the two fleets were to co-operate, some arrangement about joint captures would be essential, and in point of fact a convention was signed on May 10, 1854,² which provided that in the case of joint capture the adjudication should belong to the jurisdiction of the country whose flag should have been borne by the officer having the superior command in the action. If no arrangement was made, therefore, it might happen that neutral goods on an enemy ship captured by a French cruiser would be released by a British prize court, or that enemy goods captured on a neutral ship by a British cruiser would be released by a French prize court. Accordingly conversations between the two governments appear to have begun in January and to have continued until March, when the question was settled by the declarations which the two Allies issued to the neutrals.

¹ The importance which was attached to not antagonizing Sweden and Denmark is shown in a dispatch from M. Drouyn de Lhuys, the French Foreign Minister, to his Ambassador in London on January 12: Piggott, p. 13.

² *State Papers*, Vol. 44, p. 11: Piggott, p. 289. This convention served as a model for the convention concluded during the Great War (*State Papers*, Vol. 108, p. 361).

Our information about these discussions and the deliberations of the British Government is extremely scanty. All that exists is given fully by Sir Francis Piggott.¹ There are in existence singularly few communications from Lord Cowley, the British Ambassador in Paris, to the Foreign Office, and it seems probable that these were supplemented by private letters to the Secretary of State which have not been preserved. Nor does any record appear to exist of the deliberations of the British Government, the explanation no doubt being that these were conducted in Cabinet and not by interdepartmental correspondence. The legal questions which arose were presumably dealt with, either verbally or in private letters, by the Lord Chancellor and perhaps the Attorney-General. There was no official reference by the Foreign Office of the questions involved to the Law Officers, and in point of fact it can be shown that until the middle of March the Queen's Advocate was not aware that the question of some modification for the purposes of the war of the traditional British practice was under consideration. Ever since the beginning of January the Queen's Advocate, sometimes in conjunction with the Attorney and Solicitor-General, had been busy advising the Foreign Office on questions of international and particularly of prize law which had arisen in consequence of the expectation of an outbreak of war.² In all such cases he had of course been advising in accordance with the law as it had existed and been enforced in previous wars, but on March 15 he writes the following letter, containing a caveat which was obviously needed :

“ DOCTORS' COMMONS, March 15, 1854.

My Lord,

With reference to the numerous cases recently referred to me from the Foreign Office for reports as to cargoes and goods in which either British merchants or alien friends resident here are interested, and which may be exposed to capture in the event of war, I have the honour to state that I have been informed by the First Lord of the Admiralty that Her Majesty's Government have under consideration the expediency of introducing and announcing very shortly some important modifications in the application of

¹ pp. 13, 14, 27-40, 55-73.

² Between the beginning of January and the end of March the Foreign Office received forty-six reports from the Queen's Advocate. In those days the Foreign Office had no legal staff of its own, and it appears that every case which involved a question of international law was referred almost automatically to the Queen's Advocate.

the Law of Prize as hitherto enforced in previous wars, especially with respect to enemy's goods laden on board neutral ships, and possibly on other points of great interest and importance to all engaged in commerce.

I therefore conceive it to be my duty most respectfully to point out to your Lordship the serious consequences which may result to the commercial interests of individuals if applicants should rely and act upon the information and answers received from your Lordship in accordance with my reports in these cases (which reports are framed upon the old and existing practice in prize cases) and if immediately afterwards a course of action and policy should be determined upon and announced by Her Majesty's Government entirely at variance with such information. If, for instance, a merchant, on being informed "that the flag will not cover the cargo," should countermand his order, or forego or forfeit an advantageous contract, and should immediately afterwards find that it *will* do so, he will naturally complain. I merely mention this as one instance out of many in illustration of my meaning.

It will be, of course, entirely for your Lordship to consider whether, by delaying the answers in these cases, or appending to them any caution, or by any other means, the consequences to which I have alluded may be obviated.¹

(Signed) J. D. HARDING."

The course of the discussion is not, however, difficult to trace. Indeed, once the problem was stated, it must have become apparent that only one solution was possible. It was out of the question for either country to accept and apply a rule the illegality of which it had consistently maintained in the past. Even if the British Government had been prepared to adopt the principle of the capture of neutral goods on an enemy ship, there would have been difficulties with the Prize Court. It would have been necessary to apply the rule by an Order in Council, in which case the point which was decided sixty years later in the *Zamora* would have arisen in a most acute form. But there was no such difficulty in each state agreeing during the period of the war not to insist on the full extent of the rights which it had claimed in

¹ It must be admitted that the Queen's Advocate had some cause to complain of the methods of the Foreign Office. On March 29, immediately after the Declaration to Neutrals had been issued, he writes to point out that the copy officially supplied to him by the Foreign Office differed from the version printed in *The Times*, and it was the latter which turned out to be correct.

the past. As Monsieur Drouyn de Lhuys put it, it was essential that the two countries should act in the same way, and there was only one possible means of doing so :

“C’est que chacun renonçât au moins pour la durée de la guerre, à user des facultés que l’un des deux s’estimait permises, mais que proscrivait l’autre. Il est concevable en effet que, sans répudier un droit, sans se départir d’une prétention, l’on s’abstienne pour un temps de les faire valoir, tandis qu’on ne saurait, sans inconséquence, exercer même exceptionnellement des actes dont on conteste la légitimité. Ce mode de transaction, laissant intactes les doctrines, ne heurtait aucun principe, ne soulevait aucun embarras. Destiné d’ailleurs à être accueilli avec reconnaissance par les puissances non belligérantes, il était conforme aux intérêts comme aux intentions libérales des alliés.”¹

This solution involved the waiver by the British Government during the war of the right to seize enemy goods on a neutral ship (the French Government similarly waiving the right to capture neutral goods under the enemy flag), and it is naturally to this point that the attention of British critics has been principally directed. But, apart from the fact that this waiver was inevitable if a solution was to be found, one may perhaps conjecture that the right was not one which it was thought would be very important in the circumstances of the war. The superiority of the Franco-British naval forces was so great that they could count on effectively blockading at any rate the more important portions of the Russian coast,² and if this were done, it may well have been thought that Russian trade would be so crippled that the loss of the right to seize Russian goods under the neutral flag would not seriously diminish the amount of pressure which could be brought on the enemy. The amount of trade which Russia in fact managed to carry on, largely with Great Britain, through Prussia was probably unexpected.

¹ Piggott, p. 28.

² Portions of the Russian Baltic coast were successively blockaded as from various dates beginning on April 7, 1854. The whole of the Russian Baltic coast was blockaded from June 26 to October 21, when the blockade of the northern part was raised, and, though no formal notice of the raising of the blockade seems to have been given, the blockading squadrons were presumably withdrawn from the Gulf of Finland before the Gulf became ice-bound. A similar procedure was adopted in 1855, blockades being declared at various dates from April 17 onward, and the whole coast was blockaded as from July 12. The Danube was blockaded from June 1, 1854, to February 18, 1855, and most of the Russian Black Sea coast from February 1, 1855. The White Sea was blockaded from August 12, 1854, and from June 6 to October 10, 1855. All the existing blockades were raised in April, 1856.

Accordingly, while the discussions on each side of the Channel appear to have lasted for over two months, it would seem probable that this was due less to any serious doubt as to the solution to be adopted than to the usual difficulty in getting agreement as to the terms of a document by correspondence, and to questions of form, such as whether it would be possible for the two Allies to issue declarations in identical terms or whether declarations of similar effect but differently worded would be necessary. In the later stages a new difficulty arose owing to the proposal of the British Government to maintain the "rule of the war of 1756," which would have prevented neutrals from engaging in the Russian coasting trade. This the French would not accept, and the British Government finally dropped their proposal; in so doing they may well have been influenced by the considerations suggested above in relation to blockade, since, if most of the Russian coast were effectively blockaded, the question whether neutrals could engage in the coasting trade would be of little importance.

Accordingly on March 28, 1854, the Queen's declaration was issued, simultaneously with the declaration of war, in the following terms.¹ The declaration by the Emperor of the French, which was in identical terms except for the slight difference in wording necessitated by the fact that the claims which the two countries were waiving were different, was issued on the 29th.

"Her Majesty the Queen of the United Kingdom of Great Britain and Ireland, having been compelled to take up arms in support of an Ally, is desirous of rendering the war as little onerous as possible to the Powers with whom she remains at peace.

"To preserve the commerce of neutrals from all unnecessary obstruction, Her Majesty is willing, for the present, to waive a part of the belligerent rights appertaining to her by the law of nations.

"It is impossible for Her Majesty to forego the exercise of her right of seizing articles contraband of war, and of preventing neutrals from bearing the enemy's dispatches, and she must maintain the right of a belligerent to prevent neutrals from breaking any effective blockade which may be established with an adequate force against the enemy's forts, harbours, or coasts.

"But Her Majesty will waive the right of seizing enemy's property² laden on board a neutral vessel, unless it be contraband of war.

¹ *State Papers*, Vol. 46, p. 36; Piggott, p. 240.

² In the French declaration this passage ran: 'les vaisseaux de Sa Majesté ne saisiront pas la propriété de l'ennemi,' &c.

“ It is not Her Majesty’s intention to claim the confiscation ¹ of neutral property, not being contraband of war, found on board enemy’s ships ; and Her Majesty further declares, that being anxious to lessen as much as possible the evils of war, and to restrict its operations to the regularly organized forces of the country, it is not her present intention to issue letters of marque for the commissioning of privateers.

Westminster, March 28, 1854.” ²

In addition to this Declaration the French and British Governments had agreed upon the text of a communication to be made by their representatives in neutral countries when transmitting the text of the Declaration to the governments to which they were accredited. The text of the British note to the United States was as follows : ³

“ Washington, April 21, 1854.

Her Majesty the Queen of the United Kingdom of Great Britain and Ireland, and His Majesty the Emperor of the French, being compelled to take up arms for the purpose of repelling the aggression of His Majesty the Emperor of Russia upon the Ottoman Empire, and being desirous to lessen, as much as possible, the disastrous consequences to commerce resulting from a state of warfare, their Majesties have resolved, for the present, not to authorize the issue of letters of marque.

In making this resolution known, they think it right to announce, at the same time, the principles upon which they will be guided during the course of this war with regard to the navigation and commerce of neutrals.

Her Majesty the Queen of the United Kingdom of Great Britain and Ireland has accordingly published the accompanying declaration, which is identical with that published by His Majesty the Emperor of the French.

In thus restricting within the narrowest limits the exercise of their rights as belligerents, the Allied Governments confidently trust that the Governments of countries which may remain neutral during this war, will sincerely exert every effort to enforce

¹ In the French declaration, “ Sa Majesté ne compte pas revendiquer le droit de confisquer,” &c.

² The Declaration was enforced by an Order in Council of April 15, 1854 (*State Papers*, Vol. 46, p. 49 ; Piggott, p. 274), and Instructions to the Fleet (Piggott, p. 280).

³ *State Papers*, Vol. 46, p. 837 ; Piggott, p. 249.

upon their subjects or citizens the necessity of observing the strictest neutrality.

Her Britannic Majesty's Government entertains the confident hope that The United States' Government will receive with satisfaction the announcement of the resolutions thus taken in common by the two Allied Governments, and that it will, in the spirit of just reciprocity, give orders that no privateer under Russian colours shall be equipped or victualled, or admitted with its prizes, in the ports of The United States, and also that the citizens of The United States shall rigorously abstain from taking part in armaments of this nature, or in any other measure opposed to the duties of a strict neutrality.

(Signed) JOHN F. CRAMPTON.

The Hon. W. L. Marcy."

It is material to observe the prominence given in this note to the question of privateering, which is mentioned both in the first and last paragraphs, and is indeed the only particular topic referred to at all. As it was the object of the Allies to place as many difficulties as possible in the way of the operations of Russian privateers, it was obviously desirable that they should not make use of privateers themselves; this was provided by the last paragraph of the Allied Declarations, and they were accordingly in a strong position for making representations on the subject to the neutrals. There is evidence that the question had previously been occupying the minds of the British Government. Lord Clarendon had already been discussing the question of privateering with the American Minister in London, who was not very responsive,¹ and in a letter to Lord Shaftesbury dated March 2, 1854,² he stated that he had addressed himself privately to the Governments of France and the United States with a view to the abolition of privateering and that this proposal had been met "in a corresponding spirit," and it appears³ that a proposal had been submitted to all the maritime Powers for an agreement for the suppression of privateers and their treatment as pirates, but nothing more seems to have come of it at the time.

So far as the treatment of privateers during the war was concerned, the replies of the neutrals to the communication made to them were satisfactory. Mr. Marcy, the American Secretary of State, when acknowledging on April 28 the British Minister's

¹ *State Papers*, Vol. 46, p. 831; Piggott, p. 9.

² Hodder, *Life of Shaftesbury*, Vol. 2, p. 467; Piggott, p. 35.

³ Piggott, p. 29.

note,¹ stated that "the laws of this country impose severe restrictions not only upon its own citizens, but upon all persons who may be resident within any of the territories of the United States, against equipping privateers, receiving commissions or enlisting men therein for the purpose of taking a part in any foreign war. It is not apprehended that there will be any attempt to violate the laws ; but should the just expectation of the President be disappointed, he will not fail in his duty to use all the power with which he is invested to enforce obedience to them." Brazil, Bremen, Denmark, Hamburg, Hanover, Lübeck, Mecklenburg-Schwerin, Naples, Portugal, Spain, and Sweden forbade privateers to enter their ports and their nationals to engage in privateering.²

The Government of the United States, however, took the opportunity to urge that the principle "free ships, free goods" should be universally adopted. The rule of prize law applied by the American courts, except where a different rule was prescribed by treaty, was identical with the British. Enemy goods were liable to condemnation under a neutral flag, while neutral goods under the enemy flag were released. But by 1854 the United States had made treaties with Algiers, Morocco, Prussia, Spain, Tripoli, and Tunis providing unconditionally for the rule "free ships, free goods" and had also concluded treaties with Brazil, Central America, Chile, Colombia, Equador, France, Guatemala, Mexico, the Netherlands, Peru, Bolivia, Salvador, Sweden, and Venezuela providing for the rule of "free ships, free goods ; enemy ships, enemy goods."³ The passages in Mr. Marcy's note to the British Minister dealing with this point were as follows : ⁴

"The undersigned has submitted those communications to the President, and received his direction to express to Her Majesty's government his satisfaction that the principle that free ships make free goods, which the United States have so long and so strenuously contended for as a neutral right, and in which some of the leading Powers of Europe have concurred, is to have a qualified sanction by the practical observance of it in the present war by both Great Britain and France—two of the most powerful nations of Europe.

"Notwithstanding the sincere gratification which Her Majesty's

¹ *State Papers*, Vol. 46, p. 839 ; Piggott, p. 264.

² Piggott, pp. 305-28 ; the documents in question are given in Vols. 44, 45, 46, and 48 of the *State Papers*.

³ Moore, *Digest of International Law*, Vol. 7, pp. 434-6.

⁴ *State Papers*, Vol. 46, p. 839 ; Piggott, p. 264.

declaration has given to the President, it would have been enhanced if the rule alluded to had been announced as one which would be observed not only in the present, but in every future war in which Great Britain shall be a party. The unconditional sanction of this rule by the British and French governments, together with the practical observance of it in the present war, would cause it to be henceforth recognized throughout the civilized world as a general principle of international law. This government, from its very commencement, has laboured for its recognition as a neutral right. It has incorporated it in many of its treaties with foreign powers. France, Russia, Prussia, and other nations, have, in various ways, fully concurred with the United States in regarding it as a sound and salutary principle, in all respects proper to be incorporated into the law of nations.

“The same consideration which has induced Her Britannic Majesty, in concurrence with the Emperor of the French, to present it as a concession in the present war, the desire ‘to preserve the commerce of neutrals from all unnecessary obstruction,’ will, it is presumed, have equal weight with the belligerents in any future war, and satisfy them that the claims of the principal maritime Powers, while neutral, to have it recognized as a rule of international law, are well founded, and should be no longer contested.

“To settle the principle that free ships make free goods, except articles contraband of war, and to prevent it from being called again in question from any quarter or under any circumstances, the United States are desirous to unite with other Powers in a declaration that it shall be observed by each, hereafter, as a rule of international law.

“The exemption of the property of neutrals, not contraband, from seizure and confiscation when laden on board an enemy’s vessel, is a right now generally recognized by the law of nations. The President is pleased to perceive, from the declaration of Her Britannic Majesty, that the course to be pursued by her cruisers will not bring it into question in the present war.”

But the Government of the United States went farther than this. They made proposals to all the maritime Powers of Europe and America, except Great Britain and France, for the conclusion of treaties providing for “free ships, free goods” and the exemption from capture of non-contraband neutral property on enemy ships; i. e. the rules embodied in paragraphs 2 and 3 of the Declaration of Paris. The following account of what occurred is

taken from President Pierce's Second Annual Message, of December 4, 1854.¹

"Long experience has shown that, in general, when the principal powers of Europe are engaged in war the rights of neutral nations are endangered. This consideration led, in the progress of the War of our Independence, to the formation of the celebrated confederacy of armed neutrality, a primary object of which was to assert the doctrine that free ships make free goods, except in the case of articles contraband of war—a doctrine which from the very commencement of our national being has been a cherished idea of the statesmen of this country. At one period or another every maritime power has by some solemn treaty stipulation recognized that principle, and it might have been hoped that it would come to be universally received and respected as a rule of international law. But the refusal of one power prevented this, and in the next great war which ensued—that of the French Revolution—it failed to be respected among the belligerent States of Europe. Notwithstanding this, the principle is generally admitted to be a sound and salutary one, so much so that at the commencement of the existing war in Europe Great Britain and France announced their purpose to observe it for the present; not, however, as a recognized international right, but as a mere concession for the time being. The co-operation, however, of these two powerful maritime nations in the interest of neutral rights appeared to me to afford an occasion inviting and justifying on the part of the United States a renewed effort to make the doctrine in question a principle of international law, by means of special conventions between the several powers of Europe and America. Accordingly, a proposition embracing not only the rule that free ships make free goods, except contraband articles, but also the less contested one that neutral property other than contraband, though on board enemy's ships, shall be exempt from confiscation, has been submitted by this Government to those of Europe and America.

"Russia acted promptly in this matter, and a convention was concluded between that country and the United States providing for the observance of the principles announced, not only as between themselves, but also as between them and all other nations which shall enter into like stipulations. None of the other powers have as yet taken final action on the subject. I am not aware,

¹ *A compilation of the Messages and Papers of the Presidents*, Vol. VII, p. 2808; Piggott, p. 329. As to the proposals made to Russia, see Moore, *loc. cit.*, pp. 448-9.

however, that any objection to the proposed stipulations has been made, but, on the contrary, they are acknowledged to be essential to the security of neutral commerce, and the only apparent obstacle to their general adoption is in the possibility that it may be encumbered by inadmissible conditions.

“The King of the Two Sicilies has expressed to our minister at Naples his readiness to concur in our proposition relative to neutral rights and to enter into a convention on that subject.

“The King of Prussia entirely approves of the project of a treaty to the same effect submitted to him, but proposes an additional article providing for the renunciation of privateering. Such an article, for most obvious reasons, is much desired by nations having naval establishments large in proportion to their foreign commerce. If it were adopted as an international rule, the commerce of a nation having comparatively a small naval force would be very much at the mercy of its enemy in case of war with a power of decided naval superiority. The bare statement of the condition in which the United States would be placed, after having surrendered the right to resort to privateers, in the event of war with a belligerent of naval supremacy will show that this Government could never listen to such a proposition. The navy of the first maritime power in Europe is at least ten times as large as that of the United States. The foreign commerce of the two countries is nearly equal, and about equally exposed to hostile depredations. In war between that power and the United States, without resort on our part to our mercantile marine the means of our enemy to inflict injury upon our commerce would be tenfold greater than ours to retaliate. We could not extricate our country from this unequal condition, with such an enemy, unless we at once departed from our present peaceful policy and became a great naval power. Nor would this country be better situated in war with one of the secondary naval powers. Though the naval disparity would be less, the greater extent and more exposed condition of our widespread commerce would give any of them a like advantage over us.

“The proposition to enter into engagements to forego a resort to privateers in case this country should be forced into war with a great naval power is not entitled to more favourable consideration than would be a proposition to agree not to accept the services of volunteers for operations on land. When the honour or the rights of our country require it to assume a hostile attitude, it confidently relies upon the patriotism of its citizens, not ordinarily

devoted to the military profession, to augment the Army and the Navy so as to make them fully adequate to the emergency which calls them into action. The proposal to surrender the right to employ privateers is professedly founded upon the principle that private property of unoffending non-combatants, though enemies, should be exempt from the ravages of war; but the proposed surrender goes but little way in carrying out that principle, which equally requires that such private property should not be seized or molested by national ships of war. Should the leading powers of Europe concur in proposing as a rule of international law to exempt private property upon the ocean from seizure by public armed cruisers as well as by privateers, the United States will readily meet them upon that broad ground."

It will be observed that Prussia had replied to the American communication by proposing an additional article to the suggested treaty providing for the renunciation of privateering, and that this proposal was vigorously criticized by President Pierce, who intimated that the United States would only be prepared to accept the suppression of privateering in return for the acceptance of the complete exemption of private property at sea from seizure. It was plain that the United States regarded themselves as likely to be the weaker naval Power in any war in which they might be engaged, and that while they were anxious to protect their own ships and commerce when neutral, they had no intention of depriving themselves, when belligerent, of the right to attack their enemy's trade by the use of privateers.

A reply similar to that of Prussia was made by Portugal, and there is evidence that the Portuguese reply was sent after consultation with Great Britain and on her advice.¹ It will be seen later ² that, according to Lord Clarendon, most of the Powers to whom the American proposals had been addressed had consulted Great Britain as to their answer and that a similar suggestion had been made in each case. There does not seem to be any further evidence of this, but in the light of subsequent events it is extremely probable. In any case only four Powers accepted the American proposals as they stood and concluded treaties to give effect to them. These were Russia,³ the Kingdom of the Two Sicilies,⁴ Peru,⁵ and a fourth Power which was probably Mexico,⁶

¹ Piggott, p. 201, foot-note.

² p. 26, *infra*.

³ *State Papers*, Vol. 45, p. 125.

⁴ *Ibid.*, Vol. 46, p. 888.

⁵ *Ibid.*, Vol. 46, p. 890.

⁶ Hasse, *Index to United States Documents relating to Foreign Affairs, 1828-1861*, Part II, p. 1137.

though in this case it seems uncertain whether the treaty ever came into force. It appears that in addition Hawaii and Nicaragua acceded in 1855 to "a declaration recognising as international rights the principles contained in the convention between the United States and Russia of July 22, 1854."¹

But, although the response to the American proposals was so far somewhat meagre, one can well understand that the situation created by the action of the United States called for serious consideration by the British Government. So long as Great Britain remained the predominant naval Power her interests demanded the maintenance of the right to capture enemy goods under the neutral flag and, if possible, the suppression of privateering. It was now obvious that the policy of the United States was to obtain the suppression of the first and the maintenance of the second. The danger had been staved off for the moment, but, if nothing were done, there seemed every probability that once the war was over the American proposals would be renewed and would sooner or later be accepted by most, if not all, of the maritime Powers. On the other hand, the answers given to the American proposal seemed to indicate that it should be possible to obtain the abolition of privateering at the price of surrendering the right to seize enemy goods under the neutral flag, and whatever view might be held as to whether the suggested price was too heavy to pay, there could be no doubt that such a compromise would be far better in British interests than the situation which the United States were striving to bring about.

It was in these circumstances that the question came up at the Peace Conference at Paris when its labours were nearing a close in April, 1856. Owing to the fact that the Foreign Secretary was the first British plenipotentiary and corresponded direct with the Prime Minister, Lord Palmerston, our information as to what took place is scanty, and all that has hitherto been publicly known is that Lord Palmerston's biographer stated that during the Conference "Lord Palmerston was in constant correspondence with him and entered, with indefatigable industry, into the smallest details," and that, as regards the proposal for a declaration about maritime war, "Lord Clarendon referred the matter home, and, with the approval of the Queen and the entire Cabinet, conveyed the assent of the British plenipotentiaries to the proposal, pointing out at the same time, as a necessary proviso, 'that the declaration should not be binding except between the Powers

¹ *Messages and Papers of the Presidents*, Vol. VII, p. 2870.

who have acceded or shall accede to it.' ”¹ In addition to this, on May 3, 1898, the Attorney General (Sir Richard Webster) stated in answer to a question by Mr. Gibson Bowles that “ the draft of the Declaration of Paris was received by Her Majesty’s Government on April 7, 1856. The document was submitted to the Queen, and Her Majesty signified her approval to Lord Palmerston in writing on April 8.”² There is, however, in existence a document which is beyond doubt the material on which the statements made by Mr. Ashley and Sir Richard Webster were based ; when taken in conjunction with such other material as exists, it shows exactly what took place.³

On April 6, 1856,⁴ Lord Clarendon wrote a letter to Lord Palmerston, of which the portions material to the present question are as follows :

“ Paris, April 6, 1856.

My dear Palmerston,

It is quite clear that we can never again re-establish our ancient doctrine respecting neutrals, and that we must in any future war adhere to the exception to our rule which we admitted at the beginning of the present war, under pain of having all mankind against us. I am, therefore, for making a merit of necessity, and volunteering as a benevolent act of the Congress to proclaim as permanent the principle upon which we have lately acted, adding to it a Resolution against privateering.

... [The United States] sent a Circular to all Maritime Powers asking their assent to the neutral flag covering the goods. Most of these Powers consulted us as to the answer they should give, and we suggested that they should not agree unless the United States at the same time gave up the system of privateers.

Prussia gave that answer, . . . so they will be left alone in their system, and have the world against them if the Congress adopts the Resolution. I send you the draft of Resolution, and if you could let me know by the telegraph whether you approve it would be a convenience, although I have told Walewski⁵ that it may be two or three days before I can give him a definitive answer.

Yours sincerely,

CLARENDON.”

¹ Ashley, *Life of Viscount Palmerston*, Vol. II, pp. 107–9.

² Hansard, Fourth Series, Vol. 57, p. 181.

³ The document in question was found among Lord Palmerston’s papers and handed over to the Foreign Office by Mr. Evelyn Ashley in 1876. Permission has been given to print it in this article.

⁴ The Treaty of Peace had been signed on March 30.

⁵ The French Foreign Minister and President of the Peace Conference.

“ Draft of Resolution.

Le Congrès de Westphalie a consacré la liberté des cultes, le Congrès de Vienne l’abolition de la Traite des Noirs et la liberté de la navigation des fleuves; il appartiendrait au Congrès de Paris de consacrer l’abolition de la course et la franchise du commerce des neutres conformément aux principes appliqués dans la guerre actuelle.

Ces principes sont d’après les Déclarations émanées de la France et de l’Angleterre au début de la guerre.

Que le pavillon neutre couvre la marchandise ennemie, excepté la contrebande de guerre.

Que la marchandise neutre, excepté la contrebande de guerre, n’est pas saisissable sous pavillon ennemie.

Et que les blocus doivent être effectifs, c’est-à-dire maintenus par une force navale suffisante.”

Presumably it was impossible to summon the Cabinet in time to consider this proposal, for Lord Palmerston circulated it to his colleagues with the following note :

“ (Immediate.)

I should like to have the opinion of the Cabinet on this matter in the course of this day.

I am inclined to agree with Clarendon that the concessions which we have made to neutrals at the beginning of this war can never, or, at least, will never, on any future occasion, be withheld, and that it would be wise in us to take the lead, and to make the proposal which Clarendon suggests.

April 7, 1856.”

P.

The comments made by the different members of the Cabinet were as follows :

“ I concur.

G. G.

(Sir George Grey : Home Secretary)

I quite concur in Clarendon’s proposal. If the Americans stood out on a question of privateering against a Resolution adopted by the Congress, they will be isolated on a point in which the whole civilized world will be against them.

April 7, 1856.

P.

(Lord Panmure : Secretary for War)

I think the answer should be that we are disposed to concur in an arrangement such as is proposed, but that the several points require to be carefully considered in their bearings in all the cases which may arise.

For example, if the Americans do not agree to the Convention, would their flag as a neutral cover the goods of an enemy while they were still at liberty to make use of privateers in case of war?

It would be very desirable so to effect this arrangement as to compel the Americans to accede to it.

If it can be made of universal application, I believe it would be a most honourable and useful measure, but it should be carefully considered, and can hardly be finally settled by telegraph.

H. LABOUCHERE.

(The Right Hon. H. Labouchere : Secretary for Colonies)

I concur in this proposal. I do not think that the acquiescence of America, which we shall not get, need be a *sine quâ non*, but I agree with Labouchere so far as to think that the terms of the Protocol ought to be considered, and I should be glad to have Dr. Lushington, our great adviser in the relaxation of these laws, as an adviser upon the Protocol.

G.

(Earl Granville : Lord President of the Council)

I agree ; but, as Labouchere truly says, great care will be required in wording any instrument, so as to avoid being bound when others are at liberty.

C. W.

(Sir Charles Wood : First Lord of the Admiralty)

I concur. I cannot see why the omission of the United States should be more injurious to us than to others.

G. C. L.

(Sir George Cornewall Lewis : Chancellor of the Exchequer)

The principle is right ; but the cases pointed out by Labouchere require great consideration.

ARGYLL.

(The Duke of Argyll : Postmaster General)

We have conceded the principle in recent practice, and cannot now recede, so must make a merit of it.

R. V. S.

(The Right Hon. Vernon Smith : President of the Board of Control)

I concur in Lord Clarendon's suggestion.

M. T. B.

(The Right Hon. M. T. Baines : Chancellor of the Duchy of Lancaster)

I should be disposed to run all risks as to the non-concurrence of the United States in the Declaration against privateering, trusting to the effect of opinion in the long run, but confining the effect of the several Resolutions as far as possible to those who concurred in the whole.

HARROWBY.

(The Earl of Harrowby : Lord Privy Seal)

I am, on the whole, inclined to agree with Clarendon that we should not find it easy to re-establish the doctrine respecting neutrals, and that it may perhaps be expedient to make a virtue of necessity and assent to the Resolution proposed.

At the same time, if we were at war with France, and the United States do not agree to this Resolution, they, as neutrals, would become the carriers of all the trade of France, and we should have no means of acting against her commerce, except by blockade, which though perfectly effective as against Russia, would be very imperfect as against France, with her extensive seaboard in two seas.

At the same time also no neutral Power would be able to do the like service for us if we were at war with America.

If we agree also to the Resolution against privateers, how shall we be situated in the event of our being at war with America and France in alliance ?

Our hands and those of France will be tied, whilst the Americans will have retained their right of privateering, which they will exercise against our trade, both from the ports of France as well as from their own.

For these reasons I am disposed to think that, before we agree, an attempt should be made to obtain the assent of the United States to the Resolution.

Without their assent we shall be the only losers.

April 7, 1856.

S.

(Lord Stanley of Alderley : President of the Board of Trade)."

The proposal was then submitted to the Queen, who approved it on April 8.

"The Queen approves Lord Palmerston's proposed course.

April 8, 1856."

It will be seen that, while there was no dissent from the view that the abolition of privateering was in the circumstances worth the price which had to be paid for it, there was some inquietude among members of the Cabinet as to what the position would be in relation to Powers, especially the United States, who might not accept the Declaration. The subsequent efforts of the British Government were accordingly directed to ensuring that in such a case their hands should not be tied, and this they succeeded in securing.

The comments made seem to indicate that the members of the Cabinet were already familiar with the question ; indeed, if they had not been, the Prime Minister could hardly have circulated Lord Clarendon's letter without any further explanation and expected to get the views of his colleagues "in the course of this day." In point of fact Lord Clarendon's letter cannot have been the first that had been heard of the matter, for it had previously been the subject of discussion in Cabinet. On April 5 Lord Palmerston had written a letter to the Queen in which the following passage occurs :¹

"With regard to the proposal for an engagement against privateering, it seems to the Cabinet that as Great Britain is the Power which has the most extensive Commerce by sea all over the world, which Privateers might attack, and has on the other Hand the largest Royal Navy which can do that which Privateers would perform, Great Britain would find it for her Interest to join in an agreement to abolish Privateering. In Fact during the last war with France though the French Navy was cooped up in its Ports British Commerce suffered very materially from French Privateers fitted out in Foreign Ports, and Viscount Palmerston proposes to answer Lord Clarendon to this effect."

The Queen's reply was as follows :

"April 6, 1856.

"About the Privateers the Queen agrees very much with Lord Palmerston. Privateering is a kind of Piracy which disgraces our Civilisation, its abolition throughout the world would be a great step in advance."

The result of the Cabinet's consideration of the matter on April 7 must have been telegraphed to Lord Clarendon at once, for on April 8 Count Walewski brought his proposal before the

¹ These letters, those quoted on pp. 32, 36, and the text of the draft Declaration printed on p. 33, have been discovered in the Windsor archives and permission has been given for their publication here.

Congress, and it is obvious that an arrangement had been come to with Lord Clarendon and probably with other plenipotentiaries. Count Walewski's proposal was as follows :¹

" M. le Comte Walewski propose au Congrès de terminer son œuvre par une déclaration qui constituerait un progrès notable dans le droit international, et qui serait accueillie par le monde entier avec un sentiment de vive reconnaissance.

" Le Congrès de Westphalie, ajoute-t-il, a consacré la liberté de conscience, le Congrès de Vienne l'abolition de la Traite des noirs et la liberté de la navigation des fleuves.

" Il serait vraiment digne du Congrès de Paris de poser les bases d'un droit maritime en temps de guerre, en ce qui concerne les neutres. Les quatre principes suivants atteindraient complètement ce but :

1. Abolition de la course ;
2. Le pavillon neutre couvre la marchandise ennemie, excepté la contrebande de guerre ;
3. La marchandise neutre, excepté la contrebande de guerre, n'est pas saisissable même sous pavillon ennemi ;
4. Les blocus ne sont obligatoires qu'autant qu'ils sont effectifs.

" Ce serait certes là un beau résultat auquel aucun de nous ne saurait être indifférent."

It will be seen that this proposal was practically identical with the draft which had been sent home by Lord Clarendon, but the four objects which it was desired to achieve were more precisely stated. Lord Clarendon followed, and his observations on this proposal were as follows. It will be noted that he made it plain that Great Britain's acceptance of the rest of the Declaration must be dependent on its providing for the permanent abolition of privateering, and that the abolition would not bind the governments concerned in regard to any states that might not be prepared to accept the Declaration as a whole.²

" En terminant, M. le Comte de Clarendon rappelle qu'ainsi que la France, l'Angleterre, au commencement de la guerre, a cherché, par tous les moyens, à en atténuer les effets, et que, dans ce but, elle a renoncé, au profit des neutres, durant la lutte qui vient de cesser, à des principes qu'elle avait jusque là invariablement maintenus. Il ajoute que l'Angleterre est disposée à y renoncer définitivement, pourvu que la course soit également abolie pour toujours ; que la course n'est autre chose qu'une piraterie

¹ *State Papers*, Vol. 46, p. 125 ; Piggott, p. 337.

² *Ibid.*, p. 127 ; *Ibid.*, p. 338.

organisée et légale, et que les corsaires sont un des plus grands fléaux de la guerre, et que notre état de civilisation et l'humanité exigent qu'il soit mis fin à un système qui n'est plus de notre temps. Si le Congrès tout entier se ralliait à la proposition de M. le Comte Walewski, il serait bien entendu qu'elle n'engagerait qu'à l'égard des Puissances qui y auraient accédé, et qu'elle ne pourrait être invoquée par les Gouvernements qui auraient refusé de s'y associer."

The next day Lord Clarendon reported the proceedings to the Prime Minister :

" Paris, April 9, 1856.

My dear Palmerston.

I enclose the 4 Points respecting Neutrals and Privateers, which Walewski brought forward yesterday, and he proposes that they shd. be embodied in a declaration of the Congress. The subject will be again considered on Saturday, and as that may possibly be our last meeting I will beg of you to let me have your opinion before then.

Enclosed in above.

1. Abolition de la course.
2. Pavillon neutre couvrant la marchandise ennemie, excepté la contrebande de guerre.
3. Marchandise neutre—excepté contrebande de guerre, non saisissable sous Pavillon ennemi.
4. Les blocus ne seront obligatoires qu'autant qu'ils seront effectifs."

On April 10 Lord Palmerston submitted to the Queen the four points which it was now proposed to embody in a Declaration of the Congress :

" Viscount Palmerston presents his humble Duty to Your Majesty and begs to State that the Heads of proposed arrangement about Privateering and Neutral Rights seem unobjectionable."

On April 11 Lord Clarendon sent (probably officially, as the reply was official) to London the draft of a " Declaration respecting Maritime and Neutral Rights." A copy of this draft, which must be the first version of the Declaration of Paris, exists in the Windsor archives ; its text is as follows. It seems clear that the alterations and marginal notes (probably also the various insertions of the word " sic ") were made in London, as it will be seen

that the points to which they relate are those mentioned in the reply which was sent to Lord Clarendon.

“ *Projet de Déclaration*

donne lieu à des discussions entre ceux-ci et les

^ peut ^ même qu'il y aurait par conséquent avantage à établir une

(durée)

les rapports internationaux

Les Plénipotentiaires qui ont signé le Traité de Paris du 30 mars 1856, réunis en Conférence, considérant que le droit maritime en temps de guerre a été pendant longtemps l'objet de contestations regrettables ; que l'incertitude sur les droit (*sic*) et les devoirs des neutres [est une cause permanente de trouble dans leurs rapports avec les] ¹ Belligérants et ^ [de nature à] amener des difficultés et ^ des conflits ; [que la nécessité d'une] doctrine uniforme pour toutes les nations sur un point aussi important [est démentie (*sic*) aussi bien par les suggestions de la raison que par l'histoire des calamités auxquelles l'absence de tout accord à ce sujet a donné lieu dans le passé ;] que par une déclaration en date du 28 mars 1854 Leurs Majestés l'Empereur des Français et la Reine du Royaume Uni de la Grande Bretagne et d'Irlande ont émis relativement à la neutralité maritime pour la décrée (*sic*) de la guerre qui vient de finir, des principes essentiellement favorables aux intérêts des Etats neutres ; que les Plénipotentiaires assemblés dans ce Congrès ne sauraient mieux répondre aux intentions dont leurs Gouvernements sont animés qu'en travaillant à introduire dans [le droit public] des maximes dont le monde a pu apprécier les bienfaits dans la dernière guerre :

Les dit Plénipotentiaires sont convenus de se concerter sur les moyens d'atteindre ce but et sont tombés à cet effet d'accord sur une déclaration solennelle.

Dûment autorisés par l'adhésion for-

¹ The words within brackets are struck through in the original.

^ et entre eux comme aussi entre leurs Gouvernements et tout autre Gouvernements qui pourra y adhérer, ces principes seront désormais la règle de conduite dans tous les cas auxquels ces principes seront applicables.

This is and always has been acknowledged in international law, and it seems needless to insert it as a new doctrine.

^ et à les inviter à y accéder

^ Ils se réservent toutefois de ne pas appliquer les susdits principes à leurs rapports avec des Gouvernements qui n'y auraient pas accédés."

melle de leurs cours aux principes ci-dessus énoncés, ils déclarent donc, au nom de leurs Gouvernements, qu'en ce qui les concerne [[^] ces principes font désormais partie du droit des gens.]

En conséquence ils reconnaissent et proclament :

1° Que la course est et demeure abolie.

2° Que le Pavillon neutre couvre la marchandise ennemie, à l'exception de la contrebande de guerre.

3° Que la marchandise neutre, à l'exception de la contrebande de guerre, n'est pas saisissable sous pavillon ennemi.

4° Que les blocus pour être obligatoires (*sic*) doivent être effectifs, c.-à-d. maintenus par une force suffisante pour interdire réellement l'accès du littoral de l'ennemi.

Les Gouvernements (*sic*) des Plénipotentiaires soussignés s'engagent à porter cette déclaration à la connaissance des cours qui n'ont pas été appelées à participer au Congrès de Paris ^ et convaincus que les maximes qu'ils viennent de proclamer ne sauraient être accueillies qu'avec gratitude par toutes les nations, ils nourrissent la ferme confiance que leurs efforts pour en généraliser l'adoption seront couronnés d'un plein succès ^

On April 13 the following reply was sent to Lord Clarendon : ¹

“ Foreign Office,
13th April 1856.

My Lord,

I have the honour to transmit to your Lordship a copy of the Draft of the Declaration respecting Maritime and Neutral Rights,

¹ Piggott, p. 122.

which you forwarded to me on the 11th instant, and I have to state to Your Lordship that Her Majesty's Government concur in the substance of this proposed Declaration, provided that amendments which are suggested in the margin be made in it. Her Majesty's Government do not think it advisable to state in the preamble, as strongly as it is stated in the proposed Draft, the assertion that the maintenance of those principles of Maritime Law for which in times past Great Britain has invariably contended, must be a permanent cause of disturbance in the relations between neutrals and belligerents, and the word "calamities" seems needlessly strong as applicable to the differences which opposite opinions in regard to these questions have in time past produced. It may no doubt be politic for Great Britain to give up for the future doctrines of Maritime Law which she has in times past contended for, but Her Majesty's Government should not in doing so cast any censure upon the former course of the British Government, nor admit that the course which they are prepared to take upon a balance of advantages and disadvantages is forced upon them by necessity.

Again, it would not be correct to say that a declaration of principles such as is now proposed could alter the Law of Nations. That Law rests upon foundations wider and deeper than the occasional declaration of a few States, and it could not be altered except by some agreement much more general and much more formal than the proposed Declaration; and it would be dangerous for Great Britain to admit that such a Declaration issued by the representatives of a small number of States could alter the Law of Nations. An example thus set and a precedent thus established, by the consent and participation of Great Britain, might hereafter upon other occasions be used for the purpose of establishing doctrines of International Law to which Great Britain might have the strongest possible objection and repugnance.

It is desirable not only that the Declaration should be communicated to other States, but that the States to which it shall be communicated shall be invited to accede to it, and it is highly important to record that the principles thus proclaimed shall not be applicable to the relations of the Declaring Powers with States which shall not have acceded to the Declaration."

On April 14 the text of the Declaration was adopted,¹ the only observation of importance being that of the Russian plenipotentiary :

¹ *State Papers*, Vol. 46, p. 133; Piggott, p. 341.

“ Monsieur le Comte Orloff s'exprime dans le même sens ; il ajoute, toutefois qu'en adoptant la proposition faite par M. le Premier Plénipotentiaire de la France, sa Cour ne saurait s'engager à maintenir le principe de l'abolition de la course et à le défendre, contre des Puissances qui ne croiraient pas devoir y accéder.”

On the same day Lord Clarendon sent the following letters to the Queen and Lord Palmerston :

“ Lord Clarendon presents his humble duty to Your Majesty and humbly begs to say that upon the whole the sitting of the Congress today has been satisfactory—the declaration as to maritime law and the abolition of Privateers together with the expression of opinion respecting mediation before war is declared cannot fail to have a good effect in Engd. and to be regarded as a fitting termination to the labors of the Congress. It will meet for the last time on Wedy.—Tomorrow the Tripartite Treaty will be settled.

Ld. C. hopes to be at home on Saturday night.

Paris

April 14th 1856.”

“ Paris, Apl. 14, 1856.

My dear Palmerston,

I have again been till 6.30 at the Congress.—We have settled the Maritime and Privateering declaration in accordance with your dispatch, and have recognised the advantage of Mediation before declaring war ; but the latter will only be in the Protocol.

.”

On the 16th the Declaration was signed. Although the last three paragraphs, which had been added since the original proposal was made, met the points raised by Lord Clarendon on April 8 and in the Foreign Office dispatch, it may be inferred that Lord Clarendon was not yet satisfied that the British position was entirely safeguarded by the text as it stood, for the protocol of this meeting contains the following passage : ¹

“ Sur la proposition de M. le Comte Walewski, et reconnaissant qu'il est de l'intérêt commun de maintenir l'indivisibilité des quatre principes mentionnés à la Déclaration signée en ce jour, MM. les Plénipotentiaires conviennent que les Puissances qui l'auront signée ou qui y auront accédé, ne pourront entrer, à l'avenir, sur l'application du droit des neutres en temps de guerre, en aucun

¹ *State Papers*, Vol. 46, p. 137 ; Piggott, p. 345.

arrangement qui ne repose à la fois sur les quatre principes objet de ladite Déclaration."

The conditions which the British Government had attached to their acceptance of the Declaration had thus been attained. The adoption of the principle "free ships, free goods" was linked indissolubly, so far as it was possible for the Conference to do it, with the abolition of privateering, while the signatory Powers retained a free hand as regards countries which did not accept the Declaration. Of the other provisions of the Declaration, paragraph 3 reproduced the English rule. Paragraph 4, which abolished paper blockades, does not appear to have been the subject of any particular discussion; at any rate no record of any such discussion seems to exist, and the marginal comment on the original draft of the Declaration (p. 34, *supra*) shows that it was regarded as merely stating a generally accepted rule. In any case, although Great Britain had not in the past been altogether guiltless of declaring paper blockades, there was no reason why she should not consent to their illegality being established, for, as was shown by the "blockades" of the entire British Isles both in the Napoleonic wars and in the Great War, the paper blockade is a weapon of the weaker naval Power.

The question of course remains whether the price paid for the abolition of privateering was too high, or in other words whether the British Government were wrong in thinking that in any case they would be unable to enforce in a future war their right to capture enemy goods under the neutral flag. Into this question, which must necessarily be of a somewhat speculative character, it is not proposed to enter, but there can be no doubt that the British Government thought that their action was in the best interests of the country, and that, in view of the situation created by the American proposals of 1854,¹ the question was not whether they could effectively retain the right in question, but whether they could obtain some compensation in return for its formal abandonment. Lord Clarendon's defence of his action was made in the House of Lords on May 22, a month after the Declaration had been signed.² He was not, however, in a position to develop the full strength of his case, for the reception given by the neutrals—and in particular the United States—to the Declaration was not yet known, and in the circumstances it was clearly undesirable for him to explain the situation created by the American proposals and the importance attached to getting as universal

¹ See p. 20, *supra*.

² Hansard, Third Series, Vol. 142, pp. 488-501.

assent as possible to the abolition of privateering. But he did make his general position plain in a sentence: "And I say that the abolition of privateering is more than an equivalent for the abandonment of a claim which I know it would be impossible to sustain."

At the end of a few weeks, however, it was apparent that the object of the British Government had been attained and that any risk of the principle of "free ships, free goods" being generally adopted without any provision for the abolition of privateering had been eliminated by the signature of the Declaration of Paris. By the end of July, 1856, practically every European Power, with the exception of Spain, had acceded to the Declaration "one and indivisible." By the end of 1857 a considerable number of states of the New World (including the Argentine, Brazil, Chile, and Peru) had also acceded. Of the three (or possibly four)¹ countries who had concluded treaties with the United States in 1854, Russia was an original signatory to the Declaration, the Two Sicilies acceded in May, 1856, and Peru in October, 1857.²

A refusal on the part of the United States to accede was of course to be expected. The Declaration was (apart from the added provision against paper blockades, which was not controversial) practically identical with the proposal which had been vigorously rejected by the United States when it was made by Prussia in reply to the American suggestion for a treaty two years before.³ Accordingly, the communication from the French representative in Washington inviting the accession of the United States was answered by a long note from Mr. Marcy dated July 28, 1856,⁴ some extracts from which will suffice to show the American attitude. The Government of the United States obviously realized that the adoption and general acceptance of the Declaration meant the end of their policy of establishing the principle of "free ships, free goods" while maintaining the right to employ privateers. The note began by pointing out that the second and third propositions contained in the Declaration were identical with the proposals which the United States had made two years before.

"Four of the Governments with which negotiations were opened on the subject by the United States have signified their acceptance of the foregoing propositions. Others were inclined to defer acting

¹ See p. 24, *supra*.

² A list of the accessions up to 1875 is given in Hertslet's *Map of Europe by Treaty*, Vol. II, p. 1284. ³ See p. 23, *supra*. ⁴ *State Papers*, Vol. 55, p. 589; Piggott, p. 393.

on them until the return of peace should furnish a more auspicious time for considering such international questions. The proceeding of the Congress of the Plenipotentiaries at Paris will, as a necessary consequence, defeat the pending negotiations with the United States, if the two following propositions, contained in Protocol No. 24, are acceded to : 1st, that the four principles shall be indivisible ; and 2nd, that the Powers which have signed or may accede to the Declaration shall not enter into any arrangement in regard to the application of the right of neutrals in time of war which does not at the same time rest on the four principles which are the object of said Declaration.

“ The second and third principles set forth in the Declaration, being those submitted to other maritime Powers for adoption by this Government, it is most anxious to see incorporated, by general consent, into the code of maritime law, and thus placed beyond future controversy or question. Such a result, securing so many advantages to the commerce of neutral nations, might have been reasonably expected, but for the proceedings of the Congress at Paris, which require them to be purchased by a too costly sacrifice—the surrender of a right which may well be considered as essential to the freedom of the seas.”¹

The note then proceeded to argue that the right to employ privateers was uncontested and had hardly ever been abandoned, even by treaty. It was supported by ample authority and was a right which the United States could not give up.

“ If this country were deprived of these resources, it would be obliged to change its policy and assume a military attitude before the world. In resisting an attempt to change the existing maritime law that may produce such a result, it looks beyond its own interest and embraces in its view the interest of all such nations as are not likely to be dominant naval Powers . . . To such nations the surrender of the right to resort to privateers would be attended with consequences most adverse to their commercial prosperity, without any compensating advantages.

“ It certainly ought not to excite the least surprise that strong naval Powers should be willing to forego the practice, comparatively useless to them, of employing privateers, upon condition

¹ The expression “ the freedom of the seas ” seems to have been in current use by 1856. In more recent discussions the contention that its attainment was dependent on the continuance of privateering does not appear to have been revived.

that weaker Powers agree to part with their most effective means of defending their maritime rights. It is, in the opinion of this Government, to be seriously apprehended that if the use of privateers be abandoned, the dominion over the seas will be surrendered to those Powers which adopt the policy and have the means of keeping up large navies. The one which has a decided naval superiority would be potentially the mistress of the ocean, and by the abolition of privateering that domination would be more firmly secured.

“ The injuries likely to result from surrendering the dominion of the seas to one or a few nations which have powerful navies arise mainly from the practice of subjecting private property on the ocean to seizure by belligerents. Justice and humanity demand that this practice should be abandoned, and that the rule in relation to such property on land should be extended to it when found upon the high seas.

“ The President, therefore, proposes to add to the first proposition in the Declaration of the Congress at Paris the following words : ‘ And that the private property of the subjects or citizens of a belligerent on the high seas shall be exempted from seizure by public armed vessels of the other belligerent, except it be contraband.’ Thus amended, the Government of the United States will adopt it, together with the other three principles contained in that Declaration.

“ I am directed to communicate the approval of the President to the second, third, and fourth propositions, independently of the first, should the amendment be unacceptable. The amendment is commended by so many powerful considerations, and the principle which calls for it has so long had the emphatic sanction of all enlightened nations in military operations on land, that the President is reluctant to believe it will meet with any serious opposition. Without the proposed modification of the first principle, he cannot convince himself that it would be wise or safe to change the existing law in regard to the right of privateering.

“ If the amendment should not be adopted, it will be proper for the United States to have some understanding in regard to the treatment of their privateers when they shall have occasion to visit the ports of those Powers which are, or may become, parties to the Declaration of the Congress at Paris. The United States will, upon the ground of right and comity, claim for them the same consideration to which they are entitled, and which

was extended to them, under the Law of Nations, before the attempted modification of it by that Congress.”¹

The attitude of the United States Government was accordingly that they would not accept the Declaration unless it were coupled with the exemption of private property from capture at sea. A proposal to this effect was made to the British Government by the American Minister in London on February 24, 1857, but before any reply had been returned to it a new President came into office, and in the following April the Minister announced that he was instructed to suspend negotiations on the subject.²

Four years later, however, the American Civil War broke out, and the attitude of the three Powers principally concerned, and especially that of the United States, underwent a change which can only be described as remarkable, though in the circumstances not surprising, since governmental consistency stands a poor chance when opposed to the logic of events. The Government of the United States found themselves in the position of the stronger belligerent at sea, faced by weaker opponents who at once proceeded to issue letters of marque; France and Great Britain were neutral and consequently anxious about their trade. After consultation with the French Government, Lord John Russell instructed Lord Lyons, the British Minister at Washington, to propose that the United States should for the purpose of the hostilities which had commenced adopt paragraphs 2, 3, and 4 of the Declaration.³ As regards privateering, his proposal was as follows:

“There remains only to be considered Article 1, namely, that relating to privateering, from which the Government of The United States withheld their assent. Under these circumstances it is expedient to consider what is required on this subject by the general law of nations. Now it must be borne in mind that privateers bearing the flag of one or other of the belligerents may be manned by lawless and abandoned men, who may commit, for the sake of plunder, the most destructive and sanguinary outrages. There can be no question, however, but that the Commander and crew of a ship bearing a letter of marque must, by the law of nations, carry on their hostilities according to the established laws of war. Her Majesty’s Government must, there-

¹ This paragraph was probably due to the rules which most of the neutral states had adopted during the Crimean War refusing privateers admission to their ports (p. 20, *supra*).

² *State Papers*, Vol. 55, p. 552.

³ The following account of what occurred is derived from the correspondence given in the *State Papers*, Vol. 55, pp. 546-81.

fore, hold any Government issuing such letters of marque responsible for, and liable to make good, any losses sustained by Her Majesty's subjects in consequence of wrongful proceedings of vessels sailing under such letters of marque.

"In this way, the object of the Declaration of Paris may to a certain extent be attained without the adoption of any new principle."

Mr. Seward, the American Secretary of State, had however already sent instructions to Mr. Adams, his representative in London, and he preferred that the matter should be dealt with there. The American Government, despite Mr. Marcy's eloquent defence of privateering only five years before, and his insistence that American privateers should receive in neutral ports "the consideration to which they are entitled under the Law of Nations,"¹ were now as anxious as the French and British Governments had been during the Crimean War to put obstacles in the way of privateers commissioned by their opponents, and Mr. Adams's instructions were, if he could not get the American scheme of 1856 accepted, to propose a convention by which the United States should accept the Declaration of Paris as it stood, and he made this proposal on July 13, 1861. A similar communication was made to the French Government. Early in August both the British and French Governments were ready to sign the proposed conventions, but then a question arose which, though not expressly mentioned before, had been latent throughout the negotiations and was now to prove fatal to them. The British Government intimated their intention to attach to their signature of the convention a declaration that "Her Majesty does not intend thereby to undertake any engagement which shall have any bearing, direct or indirect, on the internal differences now prevailing in the United States." The French Government made a similar intimation. The terms of the declaration seemed harmless enough, but in point of fact it would, if accepted, have deprived the United States Government of the great advantage which it was their object to secure in accepting the Declaration of Paris. The real object of the United States was to ensure that the other parties to the proposed conventions should be thereby bound to treat Southern privateers as pirates. It was however impossible for a neutral state which recognized the South as belligerents to accept such a position, and Earl Russell put the position perfectly clearly when explaining his reasons for proposing to make the declaration. After pointing out that

¹ See p. 40, *supra*.

the British Government had come to the conclusion that civil war existed in America and had thereupon proclaimed their neutrality, while the Government of the United States "spoke only of unlawful combinations and designated those concerned in them as rebels and pirates," he continued :

"It would follow, logically and consistently, from the attitude taken by Her Majesty's Government, that the so-called Confederate States, being acknowledged as a belligerent, might by the law of nations arm privateers, and that their privateers must be regarded as the armed vessels of a belligerent.

"With equal logic and consistency it would follow from the position taken by The United States that the privateers of the Southern States might be deemed to be pirates, and it might be further argued by the Government of The United States that a European Power signing a Convention with The United States declaring that privateering was and remains abolished, would be bound to treat the privateers of the so-called Confederate States as pirates.

"Hence, instead of an agreement, charges of bad faith and violation of a Convention might be brought in The United States against the Power signing such a Convention, and treating the privateers of the so-called Confederate States as those of a belligerent power."

In these circumstances the negotiations both in Paris and London broke down, and the United States remained outside the Declaration, along with Spain, Mexico, and Venezuela.

Since the Declaration of Paris was signed, however, the United States have never, it is believed, commissioned a privateer. In 1898 the two most important of the non-acceding Powers, the United States and Spain, found themselves at war with one another. The Government of the United States at once announced their intention not to resort to privateering,¹ and Spain, while expressly maintaining her right to issue letters of marque, intimated her intention to "organize for the present a service of 'auxiliary cruisers of the navy,' composed of ships of the Spanish mercantile navy, which will co-operate with the latter for the purposes of cruising, and which will be subject to the statutes and jurisdiction of the navy."² Spain ultimately acceded to the Declaration of Paris in 1908, and Mexico in 1909. The United States have never acceded, but by developing a fleet which places them in the front rank of naval Powers they have made it

¹ *State Papers*, Vol. 90, p. 380.

² *State Papers*, Vol. 90, p. 160.

certain that their voice will never again be raised in favour of the privateer.

But it was the Declaration of Paris that killed privateering, and the policy of Lord Palmerston's Government, as it has been traced above, was thus completely successful. Opinions may differ as to whether their object was worth the price paid for it ; but there can be no doubt that their object was attained.

DENATIONALIZATION

By SIR JOHN FISCHER WILLIAMS, C.B.E., K.C.

THE All Russian Central Executive Committee and the Council of People's Commissars on the 15th December, 1921, issued a decree depriving of the right of Russian citizenship all persons who remained outside Russia and who fell under the following categories :

“(a)¹ Persons having resided abroad uninterruptedly for more than five years, and not having received before the 1st June, 1922, foreign passports or corresponding certificates from representatives of the Soviet Government.

Observation. The above-mentioned date does not hold good in the case of countries where there are no representatives of the Russian Socialist Federative Soviet Republic ; in such countries the date will be determined after the establishment of such representatives.

(b) Persons who left Russia after the 7th November, 1917, without the authorization of the Soviet authorities.

(c) Persons who have voluntarily served in armies fighting against the Soviet authority, or who have in any way participated in counter-revolutionary organizations.

(d) Persons having had the right to opt for Russian citizenship and not having exercised that right within the period prescribed for option.

(e) Persons not included under paragraph (a) of this section, who are residing abroad and who shall not have registered themselves at foreign representations of the R.S.F.S.R. within the period prescribed in paragraph (a) and in the observation appended to that paragraph.”

In November, 1926, this decree was supplemented by another which also apparently applied only to persons abroad, declaring former prisoners of war and others to have forfeited the citizenship of the U.S.S.R. but allowing them to apply for naturalization on an equality with foreigners.

In the meantime, in December, 1924, an ordinance had settled the general principles of “ Union citizenship.” According to this ordinance the following were deemed to have lost citizenship :

“(a) Persons deprived of citizenship by legislative acts of the constituent republics before the 6th July, 1923, or who are deprived of citizenship on the basis of the legislation of the Union of Soviet Socialist Republics.

(b) Persons who, having left the territories of the Union of Soviet Socialist Republics, either with or without the permission of the organs of the Union of Soviet Socialist Republics or of the constituent republics, have not returned or shall fail to return at the demand of the proper authorities.

¹ British Parliamentary Paper : “ Nationality and Naturalization Laws of certain Foreign Countries,” Misc. No. 2, 1927 (Cmd. 2852).

(c) Persons who have renounced citizenship of the Union of Soviet Socialist Republics in the manner prescribed by law.

(d) Persons deprived of citizenship by decision of a court of law.

(e) Persons who have opted for foreign citizenship on the basis of agreements with foreign states."

It will be noticed that this list is not limited in terms to persons outside Russia, though we do not know whether the reference to deprivation of citizenship by decision of a court of law applies in fact only to persons who are not in Russia. A later clause of the ordinance allows renunciation of citizenship only with the permission of the appropriate Soviet authorities. So apparently the Soviet Government claims an absolute authority to deprive its nationals of their nationality but does not allow them to abandon that nationality by naturalization abroad unless with the permission of the Soviet authorities. This is to maintain the old rule of Czarist Russia as to naturalization abroad and to extend it by claiming authority for imposing denationalization.

No denationalization on any such scale as this has hitherto been known to history. It affects some 2,000,000 people. It cannot be defended on the ground that the Soviet Republic is a new state creating a new nationality. The Soviet Republic is in international law merely a new Government in power in an old state. It stands in the same relation to the Government of the Czar as the Government of the First Republic in France stood to the Government of Louis XVI.

The ordinance of the Soviet Republic further takes power to naturalize or rather "admit to citizenship" by the action of diplomatic or consular representatives, foreigners residing abroad, and also contains a provision to the effect that "foreign citizens admitted to citizenship . . . do not enjoy the rights and are not under the obligations pertaining to citizenship of other states." The former provision is contrary to generally established principles¹ though not entirely without precedent elsewhere; the latter provision cannot, of course, affect the position of a naturalized person according to the law of his state of origin—a fact which, for Russian citizens, the Soviet's own law does not fail to recognize by its requirement of consent by the Government to naturalization abroad.

For our present purposes the important fact is the claim of the Russian Government to deprive of "citizenship," which it would seem only possible to interpret as equivalent to nation-

¹ See p. 60, *post*.

ality,¹ large numbers of persons who were formerly of Russian nationality and who are not treated as having lost that nationality in any of the ordinary ways—marriage, naturalization, annexation of territory—in which nationality is lost.

In Italy a Royal decree law of the 10th January, 1926, authorized the revocation of the grant of Italian citizenship which had been acquired by persons exercising a right of option for that citizenship under the Peace Treaties, when such persons have “shown themselves unworthy thereof by their political conduct.” Further, another law a little earlier in date conferred power on the Government to revoke the nationality of Italians, resident abroad, who commit acts which may cause the disturbance of public order in Italy. This law is in no way limited to Italians who have acquired Italian nationality by option under the Peace Treaties or by naturalization or otherwise; it applies to all Italians without distinction, provided that they are resident abroad.

In Great Britain and the greater part of the British Empire the British Nationality and Status of Aliens Acts or other equivalent legislation deprive naturalized British subjects of their nationality in cases where (1) the certificate was obtained by false representation, fraud, or concealment of material circumstances, (2) where the grantee shows disloyalty by act or speech, (3) where the Secretary of State—i. e. the Home Secretary—is satisfied that the continuance of the nationality is not conducive to the public good because the person naturalized has (to put the matter shortly) in war time traded with the enemy, *or* been convicted of a serious offence, *or* was not of good character when the certificate was granted, *or* has resided abroad and lost connexion with the British Empire, *or* in war time remains a subject of any enemy state according to the law of that state.² We have thus in the British Empire a power to cast out a naturalized person who turns out to be thoroughly unsatisfactory, without regard to the question whether he retains, or acquires, on being cast out, another nationality.³ For the present purposes the judicial safeguards—very

¹ See, however, *post*, p. 56, as to a possible distinction between “ressortissants” and “nationaux.”

² This provision was intended as a reply to the provisions of the Delbrück Law in Germany of 1913, by which a German naturalized abroad could by special permission of the German authorities retain German nationality. But Article 278 of the Treaty of Versailles compels Germany to regard German nationality as lost by any German who is naturalized by any of the Allied and Associated Powers.

³ British law (Sec. 14 (2) of the British Nationality and Status of Aliens Act) allows a British subject born out of the allegiance to renounce British nationality without requiring that he possess or acquire any other nationality. But this is the

important from the point of view of administration—to which the power of revoking nationality is subjected, are immaterial.

The Egyptian nationality law of 1926 allows Egyptian nationality acquired by naturalization, and in certain cases by the exercise of an option, to be revoked within five years after its acquisition, but not later, if the person concerned has acquired the nationality by fraud or is convicted of serious crime or disloyalty. From a practical point of view there is something to be said for this time limit of five years for revocation.

The law of the United States permits the cancellation of naturalization certificates fraudulently or illegally obtained and treats the assumption of permanent residence abroad within five years after naturalization as establishing a presumption that there was no intention (as the law requires) when the certificate was sought, of residing permanently in the United States. But the natural-born American citizen cannot be denationalized against his will. Both the grant and revocation of naturalization in the United States are by judicial process.¹ Therefore in the absence of a judicial decision annulling naturalization the Executive, though authorized by Statute² to treat a naturalized citizen who resides abroad for two years “in the foreign state from which he came” or for five years in any other state, as having presumptively ceased to be an American citizen, cannot finally determine that his American citizenship is lost. Such a decision is for the judicial branch of the Government alone.

It must not be forgotten in considering action limited to cases of *denaturalization*, that the revocation or cancellation of a naturalization certificate does not necessarily mean the rendering of a person “stateless” in international law. If the naturalization did not involve the loss of the nationality of origin according to the law of the state of origin, denationalization means rather the correction of an anomaly of international law by the destruction in the given case of double nationality, though this is really only the correction of one anomaly by another. Naturalization abroad, if granted in accordance with generally recognized principles—i. e. to residents already within the jurisdiction of the granting power—

act of the individual. Normally, no doubt, any such renunciation would only be made when the person concerned had another nationality. See the remarks of Russell J. in *Stoeck v. Public Trustee*, L.R. 1921, 2 Ch. 67, 37 *Times* L.R. 666.

¹ See an article by Henry B. Hazard, chief naturalization examiner, in *American Journal of International Law* for January, 1927, at p. 40, where the main recent American cases are cited. And also Editorial Comment by Professor Garner, *ibid.*, p. 106.

² Act of Congress of March 2, 1907.

ought to dissolve the tie of the nationality of origin.¹ It would doubtless be desirable that, as the International Law Association proposed in 1924,² when naturalization obtained by fraud is cancelled, the individual should revert to his former national status. But this is not the law, and it is not within the jurisdiction of Parliament or Congress to make it the law.

These then are cases—Russian, Italian, British, Egyptian, and American—(we do not warrant that the list is complete)³—in which a nationality law allows a state to sever the connexion between the state and one of its nationals without the consent of the person affected; laws such as that of Germany,⁴ as it existed from 1871 to 1913, by which a resident abroad for over ten years lost his nationality if he failed to maintain his connexion with his country, are based on a different principle; in those cases the individual must be taken to manifest his own desire to break the bond.⁵ But many states—France,⁶ for example—still keep banish-

¹ This seems to have been the rule in Ancient Greece, see Phillipson, *International Law and Customs of Ancient Greece and Rome*, Vol. 1, p. 140, Macmillan 1911.

² Report of 33rd Conference held at Stockholm, p. 32.

³ The Roumanian Law of 1924 permits the revocation during war of the naturalization of persons of enemy origin who are *found* guilty of disloyalty to Roumania. This is a narrowly limited power applicable to special and (it may be hoped) rare cases. French war legislation provided for the revocation of French nationality for reasons intimately connected with the war, but it was of a temporary character and expired five years after the end of the war.

⁴ The American and British provisions as to residence abroad as one of the grounds for cancellation of a certificate of naturalization partake to some extent of the character of a revocation with the consent of the person denationalized. Residence abroad is his voluntary act and, in the case of persons naturalized after the enactment of the relevant statute, an act done with knowledge of the consequences involved according to the law which formed part of the original transaction. The provisions of certain foreign laws by which entry into the service, military or otherwise, of another state involves loss of nationality, are on the same footing. The individual here in effect denationalizes himself.

⁵ In *ex parte Weber*, L.R. 1916, I.K.B., p. 283, Lord (then Lord Justice) Phillimore expressed a doubt whether an individual by unilateral act could make himself of no nationality. This doubt hardly applies where the state itself severs the tie. And, as observed by Russell, J. in *Stoeck v. Public Trustee (ubi supra)*, Sub-sec. (2) of Sec. 14 of the British Nationality Act of 1914, allows a British subject to divest himself of British, without acquiring a foreign, nationality.

⁶ French Penal Code, Articles 8, 32, 33. Banishment was, it is hardly necessary to say, a well-established penalty in Roman law. The more severe form of perpetual banishment, *deportatio in insulam*, involved loss of citizenship (Dig. XLVIII. 22, "insulae deportatio, quae poena adimit civitatem Romanam"); not so the milder "relegatio," "relegatus civitatem Romanam retinet"—(*ibidem*). But banishment in modern law does not mean loss of nationality, and citizenship in Roman law was not, of course, the equivalent of the modern nationality. The ancient Roman world of one universal empire was in a wholly different situation from the modern world of states.

ment as a part of their criminal law, and a banished person might, if an effort were made by another state to return him to his country of origin, raise a problem which in its practical aspect is not unlike the main problem which is raised as a matter of international law by denationalization.

What is the attitude of international law to these measures? Can they be said to violate either the positive international law at present in force or the principles of international law which reasonable people would wish to see in force? These are the questions which we propose to examine.¹

At the outset we must justify the tacit assumption which we have been making that this matter of denationalization is one which lies within the province of international law. Denationalization and indeed the whole question of nationality have two aspects. As between the individual and a state the question whether he is or is not a national is a matter of the internal law of the state. But the question whether or not an individual possesses a certain nationality may easily be raised as between states and for the settlement of such a controversy an appeal to municipal law may not be decisive. Municipal law may in effect be in contradiction with treaty obligations; it is also conceivable—and the truth of this we shall have to examine shortly—that municipal law may be in conflict with actually received customs amounting to positive international law. Hence even a writer such as Bluntschli² who tells us that the question of nationality is one of internal organization and of the constitutional law of every state, nevertheless includes a statement of the rights of states as to nationality as one of the propositions of international law, even though the statement is to the effect that “Every state has the right freely to fix the conditions under which it grants and withdraws the quality of citizen.” Thus, on this view, the question of

¹ Persons without nationality are, of course, as individuals often in considerable personal difficulties because under post-war conditions they are not provided with the “papers”—passports or similar documents—normally issued by national authorities to their nationals, and serving both to establish identity before foreign authorities and to allow such freedom of travel as is at present permitted to mankind. This problem, so far as it relates to the identity documents of persons without nationality in general, is to be discussed next August (1927) at the Third General Conference of Governments on Communications and Transit to be held under the auspices of the League of Nations. The special case of Russian and other refugees—some 2,000,000 in number—has been dealt with as a result of League action by the issue of “Nansen” passports, so-called in honour of the distinguished statesman and philanthropist to whom they owed their origin. These papers do not, of course, confer nationality (*absit omen* of a League nationality). This problem is in fact quite distinct from that which we are proposing to consider.

² *Droit International Codifié*, edition 1874, Section 364 and notes.

nationality is settled by international law in the sense that international law, generally and subject to the provisions of any relevant treaty, refers the nationality of an individual to municipal law, just as in the doctrine of "renvoi" English law refers for decision to the law of the domicile questions as to the distribution of the property of a person who dies domiciled abroad. But just as it is a proposition of English, and not of French, law that the goods of a British subject who dies domiciled in France are distributed according to French law, so it is a proposition of international, and not of municipal, law that the nationality of any given individual is, as a general rule, regulated by municipal law.

It is indeed obvious, not only from the general consensus of authors but from the actual conditions of the world, that the question of nationality is one which directly affects international relations. The modern world is a world of individuals organized into or under states : it is just as much an international question to what state a man belongs as to what state a territory belongs.¹ International rights and duties depend constantly on the nationality of individuals. To say that for questions of nationality there is no international law is to hand over a large mass of international matters to anarchy. But this is not to deny that according to international law, nationality as a general rule is left to be settled by municipal regulations.

So international indeed are questions of nationality that two ² of the thirteen advisory opinions already given by the Permanent Court of International Justice deal with this very subject, and one of those opinions (the Tunis case) is expressly to the effect that when questions of treaty obligations are involved a question of nationality is not a matter which "by international law is solely within the domestic jurisdiction" of a state party to the treaty.³

What then has international law to say on the question of denationalization ?

¹ The relationship of a state to territory is, of course, very different from its relationship to human beings. A state may, it is submitted, abandon territory against the will of its inhabitants and without handing it over to any other state—though examples of such abandonment since the collapse of the Roman Empire are to be found only when the country abandoned was not inhabited by civilized people. But territory is an object of desire to most, if not all, states, while most states are averse to the annexation of individuals whom another state rejects.

² Opinions No. 4 (on the Tunis and Morocco Nationality decrees) and No. 7 (on the acquisition of Polish nationality).

³ See in particular paragraph 4, pp. 30 and 31 of the opinion. What a shadow of a great rock in a weary land it is to an Anglo-Saxon lawyer to quote an authority in international law !

Let us consider the point first as one of principle, for even if the matter cannot be settled as one of principle it is still useful to see where principle would lead us.

Unluckily it is notorious that the principles which every one would admit to be desirable as bases of an international law of nationality are very far from being realized in practice. *Quantula sapientia regitur orbis terrarum!* On principle every individual should have one nationality and one only: in practice, some individuals have no nationality and some have more than one. It is therefore not possible to say—as would be the case if the reasonable law was that actually in force—that for a state to denationalize an individual who on denationalization acquires no new nationality is legally impossible as resulting in the production of something which would be a violation of positive international law in the shape of a person of no nationality. If we are to declare denationalization to be a contravention of international law, we cannot base ourselves on any such general principle. We must turn to positive international law and examine it more closely.

Some years ago, when individualism was the prevailing creed, it might—or could—have been possible to find a ground for invalidity which current opinion could have accepted, in the general principle that the state could not at its own will terminate the status of one of its members. Individualism—such as that dominant in 1870 when the original main British Naturalization Act was passed—reversed the dogma *nemo potest exuere patriam* and seems to have been prepared to accept the contrary view: *patria potest exuere neminem*. At any rate this latter proposition would seem to be the logical—if unexpressed—result of statements such as “the right of renouncing a nationality of origin and acquiring another is an innate right, personal and inherent in every man”:¹ “Every person, who is possessed of the necessary capacity for the exercise of civil rights, can freely choose the state to which he or she means to belong, renounce a present nationality and acquire a new one . . .”² “The right of expatriation is a natural and inherent right of all people indispensable to the enjoyment of the right of life, liberty, and the pursuit of happiness.”³ If the individual is to have perfect freedom of choice, he can hardly be

¹ Fauchille, *Droit International Public*, Part I, Sec. 417.

² Fiore, *Droit International Codifié*, Articles 377, 338, and 382; quoted by Fauchille *ubi supra*.

³ Resolution of the Congress of the United States adopted in 1868. (Quoted by Westlake, *International Law*, Peace, Chap. X, p. 219 of 1st edition. See also proceedings of International Law Association, Stockholm Conference, 1922, p. 32.)

cast out against his will by a state to which he wishes to continue to adhere.¹ The right of expatriation is not freely exercised if it is set in motion by an expulsion from citizenship. Times, however, have changed and men's opinions with them. Declarations such as the above are accepted, in the present practice of states and with the growth of other doctrines, subject only to reservations of the general rights of states against individuals which would severely limit their generality. Modern nationality laws show a distinct tendency to deny to individuals the power to abandon their nationality of origin without the special consent of the state of origin.²

And indeed it is easy and attractive to compare the status of nationality with the other chief modern example of status, that of marriage, and then to say that it is not reasonable that one party only should have a unilateral power of dissolving the tie. But the analogy is false. In the first place while it is desirable that every one should have a nationality, it is neither possible nor desirable that every one should be married. To put a married person into the class of the unmarried, is (apart from controversial questions as to divorce) a harmless operation from the political, legal, or social standpoint. But the creation of stateless persons is to be deprecated. Next, the status resulting from the tie between state and individual which is called nationality is not on all fours with the status which results from the tie between man and woman which is known as marriage. The status of marriage results from contract; nationality, with the possible exception of the case where it results from an express act of naturalization, is not based upon contract, but is a status imposed at birth independent of the will of the individual. Nor is the right or claim of the state to denationalize limited to cases of nationality acquired by naturalization.³ One cannot therefore justify denationalization by the state

¹ No. 13 of the projects of Conventions for American (non-Canadian) International Law prepared under the auspices of the American Institute of International Law gets over the conflict of the two principles by stating them side by side. "Every natural or juridical person enjoys upon the territory of each American Republic . . . freedom to enter . . . and to dwell therein provided the local laws and police regulations are observed, *without prejudice to the laws of immigration and the right of expulsion.*"

² Russia (1921), Greece (1914), Siam (1913), China (1914), Latvia (1921), Poland (persons liable to military service) (1920), Afghanistan (Code of 1921?), Esthonia (1922), Lebanon (1925) (*sed quaere*—there is a curious difference which this is not the place to discuss between the nationality laws of Syria and Lebanon on this point).

³ It is perhaps worth while to look at the grounds on which British law allows denationalization (see p. 47 *supra*) and consider how far such denationalization can be based on the theory of the rescission of a contract.

It is arguable that a man who is not of good character when he gets his certificate

on the ground that the individual has broken his contract with the state—at least this could only be done by resuscitating the theory of the social contract in its most extreme form and applying it to each individual, and, even if it were so applied, one would have to insist upon something in the nature of a judicial investigation as an indispensable condition of the exercise of a right by the state to declare the contract at an end.

If, however, the present generation has cut itself loose from individualism, it does not follow that it has adopted any general theory of the omnipotence of the individual state in such a matter so that we could say, without further inquiry, that it is self-evident as a matter of international law that a state can destroy the tie that links it to a subject or citizen. On the contrary, it is of the essence of modern international law that states are members of a community and therefore in the sphere of their mutual relations owe duties one to another. Does then the destruction of the tie that binds a state to an individual in and by itself violate any, and, if any, what, duty of the state to its fellow states? Any such duty, if it exists, must be based on the evil results to the community of states from the existence of persons without nationality. But it is clear that this duty (if any) is violated equally when the municipal law of any country allows a national of his own will to cut himself loose from the state to which he belongs and become a person of no nationality. From the point of view

or who does not in good faith, when he applies to be naturalized, intend to maintain his connexion by residence or otherwise with the British Empire, obtains British nationality by a representation false to his own knowledge which entitles the state, on discovery of the fraud, to withdraw the nationality, but it is difficult to apply a similar argument to other grounds of denaturalization mentioned in S. 7 of the British Nationality Act. In those other cases the man turns out unsatisfactory, but it cannot be said that he obtained his certificate by fraud. In any event, even if the status were induced by fraud, *restitutio in integrum* by treating the naturalization as void *ab initio* seems not to be contemplated by British legislation. The revocation of a certificate according to S. 6 (6) of the British Act is "to have effect from such date as the Secretary of State may direct," but in the absence of express language this would seem not to give authority to direct that the effect of revocation is to be retroactive; it is understood that the current Home Office practice is based on this view, and the revocation takes effect as from the date of the revocation order. Absolute retroactivity would in fact be impossible; if the person naturalized has voted in a parliamentary election, could his vote be cancelled retroactively and, possibly, the result of the election changed? In such a matter does not the maxim of the Greek poet apply—that to make what has been done as though it had never been, is the one power denied even to God? It should always be noted that the British procedure requires a reference to judicial inquiry in any case in which the person affected can reasonably claim to dispute the facts. For an instance of such a judicial inquiry see *The Times* newspaper, June 24–8, 1919.

of international law, it is immaterial how the result of being a denationalized person is produced, whether by unilateral action of the state, or by unilateral action of the individual, or by concordant action of both state and individual. If the municipal law allows the result to be produced, the method by which it reaches the result is internationally immaterial. The denationalization may or may not be unjust to the individual; it may or may not be accompanied by domestic penal measures; in existing conditions that is nothing to do with the community of states. The sole question to consider is whether the creation by municipal law of stateless persons, persons of no nationality, constitutes in and by itself an international wrong.

Now we have seen already that the stateless person exists in international law and is at present tolerated even if he be an anomaly. If then a person is living inoffensively whether in his own country or, what is more usual in cases of denationalization, in another, it is not possible to say that the change in his status gives any foreign state the right at once to complain or to challenge the validity of what has been done. The matter resting entirely between the denationalizing state and the denationalized individual, no foreign state has notice of what has happened and no foreign state can allege that any right of its own has been violated. In fact, in normal circumstances it might be thought, from a purely cynical point of view, to be rather to the advantage of the state where an alien resides that he has no state to whom he can appeal for diplomatic protection.

This, however, is not the end of the matter. A question of international rights and duties may well arise at a later date if and whenever, for some reason, whether in consequence of a criminal offence or in pursuance of some general policy, the country where the denationalized person finds himself is tired of his presence and wishes to deport him. The state may then find itself unable to remove an alien whom it considers undesirable, if there is no state against whom to apply the rule of international law that every state is obliged to receive its own nationals,¹ but not to receive aliens. This rule is now well recognized and has acquired prominence at the expense of the earlier rules of free migration, which were admitted by our more individualist ancestors.

The proposition that a state can of its own sole authority sever the link which binds it to its own nationals in such a way as to be

¹ See e. g. Bluntschli, *ubi supra*, sec. 368; Oppenheim, *International Law*, Peace, sec. 294; Fauchille, *ubi supra*, sec. 451.

no longer compellable to receive back the person denationalized if another state should wish to deport him, involves then the consequence that a state has it in its power by unilateral action to deprive other states of a right which they now possess in relation to particular individuals. It seems contrary to positive international law to admit that an international right can be thus destroyed. The duty of a state to receive back its own nationals is laid down by the accepted authorities in the most general terms and is in accordance with the actual practice of states. No state has any such duty in relation to individuals who are not its nationals. The duty is not a duty which the state owes to the individuals concerned; it is an international duty which it owes to its fellow-states. It is surely contrary to principle that a state should in relation to any particular individual, whether inside or outside its territory, by its own unilateral act free itself from this obligation. The fact that there already exist persons of no nationality is for this purpose irrelevant.

Apart from this general argument, it may be said that when a state issues to one of its nationals a passport for foreign travel, it impliedly undertakes with any state whose officials admit the bearer to its territory on the faith of the passport, that it will receive back the bearer of the passport, should he be expelled. Country A cannot in fact, in the language of a British passport, "request and require" country B to aid and assist X, whom it describes as its own national, and then without the assent of country B disclaim the implied undertaking. This argument does not, however, cover a case where the individual comes abroad without a passport and is then denationalized either against his will or with his own consent, or has been denationalized before coming abroad.

Effect might be given to the duty of states to receive back their nationals notwithstanding a loss of status by regarding what is in municipal law a deprivation of nationality or citizenship as not amounting in international law to a complete destruction of the international responsibility of the state as a member of the community of states. A man would remain a "ressortissant"¹ although no longer a "citizen," "subject," or "national" of the country which sought, with or without his consent, to cast him off. And in fact on a recent occasion known to the writer distinguished French and Italian lawyers gave an opinion to the effect that the

¹ There is no single English word that accurately translates "ressortissant." "Dependent" is etymologically equivalent, but not equivalent in usage.

word "ressortissant" used in connexion with state A included persons who were in law nationals of state B, in a case in which they were in fact under state A's administration. Or again, a precedent might be sought in the indeterminate relationship which under the old German nationality law (pre-1912) subsisted between the Reich and Germans who had lived more than ten years abroad without being in touch with any German consulate. Such persons, at any rate in the view taken in the English Courts during the war,¹ still retained a connexion with Germany which we English for the want of a better word called "nationality," though perhaps a German lawyer would have given it some other name. And another practical analogy may be found in the practice of the United States with regard to naturalized American citizens who stay abroad for prolonged periods; such persons appear to be regarded, not as citizens in the sense that they possess any active rights to protection, but as individuals whose connexion with the United States subsists at any rate to this extent that they cannot be refused admission.

The general attitude of the world to these questions of migration and expulsion of individuals is at the present time fundamentally different from what it was in earlier centuries. And the change does not depend merely on the recent decay of individualism. It is determined by the profound change in the physical and demographical conditions of the world. The world used to be under-populated. It is now, according to the common opinion (whether this opinion is right or not is for present purposes immaterial) over-populated, or in danger of becoming so.

It is no longer possible simply to send undesirables abroad. Slops may be thrown out of the windows of a settler's hut on a prairie; in a town such a practice is inadmissible. English law has long ago abandoned the practice of transportation—partly no doubt from the fact that no temperate colony is now sufficiently under home control to allow of a practice, which from the point of view of criminology would, if carried out with humanity, have much to recommend it—and has also long since ceased to attempt the simple measure which Cromwell's major-generals put in force of sending abroad "persons without visible means of subsistence."² Formerly states welcomed immigrants without discrimination; they now for the most part discourage them.

¹ See the cases of *ex parte Weber*, L.R. 1916, A.C. 421 (ten years' absence abroad), and *ex parte Leibmann*, L.R. 1916, I.K.B. 268 (formal discharge from German nationality).

² This was, of course, a political measure, not a step intended to solve the problem

Perhaps there is a further reason for this change of attitude in the fact that under the conditions of former centuries, travel being more dangerous and more expensive and migration being often caused by religious or political persecution and so affecting a more desirable element of a community, immigrants were of a different class from those who are more common to-day. The penal laws of many states have not yet in form recognized this change: thus, as already noticed,¹ French law still includes banishment as a penalty, though without the assent of other states, which they are free to give or withhold as they think right, a sentence of banishment may be inexecutable.

The result is that there is perhaps a somewhat nervous tendency to exaggerate the importance of any question connected with the almost sacred right of the state to deport which has taken the place of the "natural" right of the individual to migrate. When the person sought to be deported has been denaturalized, he will not necessarily have lost his nationality of origin if the law of his state of origin did not recognize naturalization abroad, and so his state of origin is in such a case still bound to receive him. And even if the numerical deduction to be made on this latter score is trivial, still the total numbers likely to be involved—i. e. the numbers of the denationalized whom it is probable that states will wish to deport—are not large.² When the denationalization is the result of political differences between the state and the individual, the authorities of a civilized country would be slow to insist on deportation to the state of origin. The individual would, even if his removal were insisted upon, be allowed to endeavour to find some other state whose frontier would not be closed.³ Deportation is, after all, intended not as a punishment

of the Poor Law. See Gardiner, *Commonwealth and Protectorate*, Vol. IV, p. 236, where the case of Lucy Walters, mother of the Duke of Monmouth (according to Gardiner, Charles II was *not* the father—if so, this is surely an instance of one of History's Little Ironies), is specially mentioned. She was unquestionably a British subject, but was ordered by the Council to be "sent back to Flanders."

¹ p. 49, *supra*.

² From 1918 to the end of the year 1926 there were 163 cases in which certificates of naturalization were revoked in Great Britain. A large proportion of these cases arose more or less directly out of the war. In current practice by far the most usual cause of revocation is residence out of H.M. Dominions. The annual average number of grants of certificates at the Home Office in recent years (1922-6) is almost 910. No case has yet arisen in which a foreign state has sought to send back to Great Britain a denaturalized ex-British subject.

³ The French papers of February 21, 1927, report a case where an Italian expelled from France has been allowed to land in a country other than Italy, the expulsion being treated as having been for "political reasons."

but primarily as a method of relieving the expelling country of the presence of an individual considered to be undesirable, though if all countries concerned insist on exercising their rights to the full, this can only be done by returning him to the country where he properly belongs. Certainly deportation ought not to be used as a method of handing over individuals to their political enemies—a purpose for which states are unwilling to admit an obligation to grant extradition—even though it may inevitably, if insisted upon, in some cases produce this result. It would be felt as an injustice in an ordinary case to add deportation to Soviet Russia to a criminal sentence on a White Russian.

This applies, however, only to isolated cases arising under the criminal law in what we may hope will be the normal constitution of international life. At the present time the question of the legal liability of a state to receive back its former nationals is raised directly by the action of the Soviet Government in the abnormal circumstances resulting from the war. The Russian Government apparently ¹ refuses to receive back from Roumania Russian soldiers made prisoners of war by the German or Austrian armies, on the ground that they have lost Russian citizenship. It is regrettable that there is perhaps very small probability that the point at issue will be referred to the Permanent Court of International Justice.

Perhaps in the future the point will arise between two states, both of whom are either bound already by acceptance of the so-called compulsory jurisdiction clause of the Statute of the Permanent Court, or are willing to bind themselves to submit the matter to the Permanent Court. When that happens, we shall get a decision.

But for the present the matter is likely to remain in the limbo of legal theory, and there it ought not, in normal conditions, to lead to serious conflicts between states. It would, of course, be quite another matter if a state were so forgetful of its duty to its neighbours as deliberately to plant its agents on their territory, denationalize those agents (whether before or after their leaving the country of origin is immaterial) and then refuse to receive them back on expulsion. Such conduct would be a burlesque of the claim to get rid of the duty to receive back a national which might be made in an ordinary case of denationalization, and may safely be dismissed as inconceivable. But if, either by general agreement or as a result of a decision of the Permanent Court, it were possible to establish the legal proposition that no state can

¹ See *Le Temps* for March 8, 1927.

by unilateral action without the concurrence of another state so sever its tie to its own nationals as to get rid of its obligation to receive them back across its frontiers, we might be on the way to a more rational ordering of the whole problem of nationality.

One other avenue may be explored. The grant of nationality is an act of sovereignty.¹ In principle therefore such an act can be done only on the territory of the granting state or on territory where, or relative to persons over whom, it has jurisdiction. British legislation recognizes this principle to the full: the Secretary of State can naturalize only residents in Great Britain or persons in the service of the Crown, and a British subject can lose his nationality by foreign naturalization only if he is in a foreign state.² It would indeed be anomalous if international law allowed one state to reach out its hand into the territory and jurisdiction of another and without its consent to change the status of an individual there. It would be as much contrary to principle for one state to naturalize persons in the territory and jurisdiction of another as to marry or divorce them. It is strange to find that there is some hesitation in certain countries to recognize a principle so obviously in accordance with the requirements of international intercourse.³ An attempt to naturalize a person out of the jurisdiction of the naturalizing Power will in most cases only result in an unfortunate conflict of law between the naturalizing state and the state of origin.⁴

If this is right as a matter of principle, it might be suggested that the same rule applies to a forcible denationalization of a person abroad; equally it might be said, we have here an act of sovereignty taking effect outside the limits of the jurisdiction and making a forcible change in the status of an individual outside. The answer is perhaps that denationalization is an act of abdication, a surrender of a claim to the allegiance of an indivi-

¹ Fauchille, *ubi supra*, sec. 422, "La naturalisation est un acte de souveraineté."

² Different considerations apply to loss of nationality by declaration of alienage under S. 14 of the British Nationality and Status of Aliens Act. In such cases there is no act of state.

³ Cf. The Jupiter, 43 *Times Law Reports*, 210, where it was recognized by all persons (including the Soviet Republic interested) that "nationalizing decrees do not operate upon property outside the territory of the state making the decree."

⁴ The laws of Greece, of Soviet Russia, of Brazil, and of Persia (and possibly this list is not exhaustive) recognize the possibility of naturalization outside the jurisdiction. It is to be hoped that little attempt will be made to translate this possibility into action. It is significant that the laws of most states allow the naturalization abroad of one of their nationals to have the effect of destroying the nationality of origin only where the person concerned is resident abroad.

dual, and cannot properly be treated as on all fours with naturalization, which is an acquisitive act, a kind of annexation, by which the state acquires a new citizen or subject. If we apply the analogy—imperfect no doubt, but still an analogy—of the abandonment or cession of territory, that operation may be conceived as effected legally at the seat of the sovereign power of the withdrawing state, whereas annexation on the other hand involves an acquisitive act of sovereignty upon the territory annexed.

What then is the conclusion of the whole matter? There will be general agreement that a state cannot, whether by banishment or by putting an end to the status of nationality, compel any other state to receive one of its own nationals whom it wishes to expel from its own territory. There will also be general agreement that a state is bound to receive back across its frontiers any individual who possesses its nationality or who is one of its “ressortissants.” If so, it follows that while positive international law does not forbid a state unilaterally to sever the relationship of nationality so far as the individual is concerned, even if the person affected possesses or acquires no other nationality, still a state cannot sever the tie of nationality in such a way as to release itself from the international duty, owed to other states, of receiving back a person denationalized who has acquired no other nationality, should he be expelled as an alien by the state where he happens to be.

THE DOCTRINE OF CONTINUOUS VOYAGE, 1756-1815

By O. H. MOOTHAM, M.Sc.

Explanatory Note of Reports used.

THE account of the beginnings of the Doctrine of Continuous Voyage which is set out in the following pages is based very largely on the series of manuscript reports, or rather notes, of cases which have recently been found in the Public Record Office by Mr. C. J. B. Gaskoin and described by him in the *British Year Book of International Law* for 1923-4.

The reports are those of Sir John Nicholl, who succeeded Sir William Scott as Judge of the Prerogative Court, but who at this time was first an ordinary pleader and then King's Advocate, and those of James Henry Arnold, D.C.L., who in his turn succeeded Sir John Nicholl as K.A.

The reports of the former of which use has been made consist of eight volumes of notes taken in the Court of First Instance (cited as *Nich.*), each volume being of size about 8 in. by 4 in. and containing some 340 pages, and one larger volume (*Nich. app.*) lettered "Z" containing what Nicholl considered the salient points of prize appeals.

Dr. Arnold's notes fall into three classes. There are first his notes of cases in the Admiralty Court (*Arn.*). These are written in note-books of approximately the same size as those used by Nicholl but containing fewer pages—some 170 to each volume. They are fifty-one in number. There are then five similar volumes in which are found his notes of prize appeals for the years 1787-97 (*Arn. app.*). The continuation of these notes on appeals to the year 1822 constitutes the third group (*Arn. MSS.*). They differ from the others in that they are written, not in note-books, but on large loose sheets of paper folded and refolded into sixteen or thirty-two narrow columns.

For purposes of reference each group of reports has, where possible, been arranged in chronological order and numbered in the manner shown in the following table :

Reports of Sir John Nicholl.

<i>How Cited :</i>		<i>Lettering on Cover :</i>	<i>Record Office Reference :</i>
<i>Nich. app.</i>		'Z'. Notes on Prize Appeals 1794-1817.	H.C.A. (Adm. Ct.) Instance and Prize. Misc. bdle. 466.
1. <i>Nich.</i>	Easter 1793-Hilary 1797.		bdle. 464.
2. "	1797.		"
3. "	1799.		"
4. "	1800-1801.		"
5. "	1802-1803.		bdle. 465.
6. "	1804.		"
7. "	March 1806-Nov. 1807.		"
8. "	Mich. 1807-Mich. 1808.		"

Reports of Dr. Arnold.

1. <i>Arn. app.</i>	1787 (Prize Appeals)	bdle. 468.
2. "	Pr. App. Oct. 1797-Mar. 1795.	"
3. "	Pr. A. 1795.	"
4. "	Pr. Dec. 1795-Nov. 1796.	"
5. "	App. 1797.	"
<i>Arn. MSS.</i>	1798-1822.	bdle. 469.
1-6. <i>Arn.</i>	1787-1793	" 470.
7-16. "	1793-1797	" 471.
17-27. "	Aug. 1797-March 1801.	" 472.
28-36. "	March 1801-May 1807.	" 473.
37-51. "	May 1807-Feb. 1829.	" 474.

The doctrine of continuous voyage was a legal conception formulated to prevent evasion of that limitation on neutral trade which became known as "The Rule of the War of 1756." This Rule¹ declared that neutrals may not engage in time of war in a trade not open to them in time of peace. For it was, in the eighteenth century, an integral part of the then prevailing colonial system of Europe for each state to reserve its colonial trade to its own nationals, and to exclude all foreign ships from commercial intercourse with its colonies. The desire of the French to safeguard their colonial trade, from participation in which British naval superiority had driven their shipping, compelled them in

¹ The doctrine known as "The Rule of the War of 1756" received formal enunciation in the year from which it takes its name; but it was acted upon at least a century and a half before, when in 1604 the Venetian ambassador acquiesced in the condemnation of two Venetian vessels—*The Ponte* and *The Veniera*—seized by the Dutch for engaging in the "closed trade" of Spain, with whom Holland was then at war (*Cal. of State Papers*, Venice, Vol. 10, no. 184 (1604), and *State Papers for Ireland*, 1626, p. 116. These, and a case in 1630, are cited by Marsden in 25 E.H.R. 244). The earliest English case is that of *The Ceres*, seized in 1744 (H.C.A. : Adm. Ct. Misc. 875, vol. tit. "Adm. Reports", p. 7). On the question of the legality of the Rule itself, see Madison's *Examination of the British Doctrine* (1806), Pinkney's "*The Memorial of Merchants and Traders of the City of Baltimore*" (in Wheaton's *Life, Writings and Speeches of William Pinkney* (1826), p. 372), and, for the British case, James Stephen's *War in Disguise* (1806).

1756 to open this commerce to Dutch vessels, although excluding other neutrals. The courts of this country, however, refused to allow such traffic, holding that a neutral, by engaging in time of war in a trade closed to him in time of peace, rendered services to a belligerent which were inconsistent with a neutral's duty of impartiality. The court reaffirmed this rule when, in 1793, the French threw open their colonial trade to all neutrals.¹

Although Great Britain always maintained the principle so far as the trade between colony and mother-country was concerned, she relaxed her practice so as to allow neutral merchants to trade directly with the colonies themselves.² Neutrals could always trade directly with France—for such trade was open in peacetime—and hence it was perhaps inevitable that attempts should be made to evade the “Rule of 1756” by touching at a neutral port and so endeavouring to break an illegal voyage into two legal halves.

The doctrine of continuous voyage was the name given to the rule that a neutral may not carry on circuitously a trade which he is not allowed to engage in directly. The name of the doctrine is misleading. It received its name at a period when attention was directed to the voyage of the ship, and on this ground it may be explained. But the continuity which is essential is not that of the voyage of the ship but of the transportation of the cargo. The term “continuous transports” did not come into use until the American Civil War, when cases arose where cargoes were not carried on the circuitous voyage in one vessel, but underwent transshipment at some neutral port. It is submitted that it was in this type of case that the doctrine had its origin.

I

The Seven Years' War.

During the latter half of the eighteenth century three great wars disturbed the peace of Europe. The War of the Austrian Succession witnessed the first application by our courts of what became known as “The Rule of the War of 1756.”³ The Revolutionary Wars of the century's close found the doctrine of continuous voyage firmly established; it is in the Seven Years' War that its origins are to be sought.

¹ The *Immanuel* (1799), 2 C.R. 186.

² The Admiralty Instructions of January 8, 1794, contained a relaxation in favour of American traders, and those of January 25, 1798, in favour of neutrals generally: see 2 C.R. Appendix.

³ The case of *The Ceres* (quoted above, p. 63, n. 1).

The "Rule of 1756" was twofold in character. In noting that a neutral could not in time of war pursue the advantages of a trade closed to him in time of peace, it is important to remember that the offence touched both ship and cargo. The ship was liable to condemnation for being engaged on an illegal voyage;¹ the goods to confiscation for being taken on a course of commerce which was prohibited.² The illegality of the voyage must, it is submitted, be kept apart from that of the trade.

While considering the earliest cases it is necessary, first, to mark off a certain type of case which bears a close resemblance to that concerning continuous voyage, but which does not, in fact, touch it at all. Those cases must be marked off as outside our purpose wherein the need of invoking the doctrine of continuous voyage is not essential to secure condemnation. *The Yong Vrow Adriana*³ was a Dutch ship which was seized in 1758 while on a voyage from Cadiz to Marseilles. The cargo consisted in part of colonial produce transhipped from two French vessels at the former port. The bills of lading and an affidavit on board declared the goods to belong to subjects of the King of Spain and other neutrals. The Admiralty Judge having condemned the colonial produce, the claimants appealed to the Lords. Their Lordships

"declared from the evidence from both sides that the transboarding on this occasion was not done in any fair course of trade or commerce, which ever did, or ever can exist in time of peace, but was a fraudulent contrivance merely on account of the war to continue the original voyage and cover the goods of the enemy to their destined port, entitled to the same privileges and liable to the same duties and consequences as if they had arrived on board the same ship on which they were first laden, and therefore an actual sale for a consideration really paid ought not to be allowed to screen, but ought to be considered as a mode of unfair assistance to complete the original voyage in favour of the original proprietors, the original consignees, and the public revenue of the enemy arising from the duties."⁴

It is evident that here the Lords considered it unnecessary to invoke the principle of continuous voyage. They went behind the sale, and finding the intention to defraud, condemned the goods as enemy property.⁵

The earliest case of the application of the doctrine of con-

¹ *The Anne* (1801), 3 C.R. 92 n., a decision of the Lords, and see per Mr. Justice Daniel in *Jecker v. Montgomery*, 18 How. 110.

² *The Jonge Thomas* (1801), 3 C.R. 233 n. See also cases cited by the King's Advocate in *The Minerva* (1801), 3 C.R. 229; in that case, however, the ship was restored on the authority of *The Rebecca* (1799), 2 C.R. 101.

³ Burrell, *Reports of Cases determined by the High Court of Admiralty and on Appeal therefrom, 1758-74*, ed. by Marsden (1885), 178.

⁴ *Ibid.*, p. 180.

⁵ *Ch. La Ville de Bilbao* (1758), Burrell, 203.

tinuous voyage which has yet been found is that of *The Jesus*.¹ This was a Spanish ship which was seized in 1756 while on a voyage from Corunna to San Sebastian, a small Spanish port close to the French frontier. Her cargo, taken on at Corunna from a French East India vessel, consisted of saltpetre and French colonial produce, all which was claimed as the property of a Spanish subject. The Admiralty judge released the ship and the cargo with the exception of the saltpetre, which he condemned as contraband. However, on appeal by the captors, "the Lords assigned the claimant to make proof that the ship and cargo were Spanish property, and that the ship, when taken, was bound from Corunna to San Sebastian, and to no other port within two months."² The cargo of saltpetre was condemned by both courts as contraband; but as the immediate destination of *The Jesus* was neutral, the decision must have proceeded on the ground that this voyage was only the initial stage of a transportation which was to have ended in France. Furthermore, assume that whereas the claimants, in obedience to the order for further proof, succeeded in satisfying the court on the first point but failed on the second. Assume, that is, that the ship and cargo were Spanish property, but that both were destined within two months for a French port. It seems that condemnation, at least of the cargo, must have been the inevitable consequence. There appears, also, only one ground for it, namely the application of the "Rule of 1756" through the doctrine of continuous voyage. That is, these goods would be condemned as being taken in a prohibited course of commerce. As the trade between Corunna and San Sebastian was not prohibited—for if it were, it would have led to condemnation in the first instance—the carriage from the French island to Corunna, from Corunna to San Sebastian, and thence to a port of Old France, must have been considered as one continuous transportation.

In the following year a Spanish vessel³ was seized while on her way to Nantes. Her lading was of tea, coffee, and logwood transhipped from a French East Indiaman in the Road of Port Passage. The bill of lading expressed the cargo "to be on account and risque of a Spaniard." The Admiralty judge held the goods to be French property in prosecution of a voyage from the French East India Settlement to France, and he condemned them as "goods of enemies or otherwise liable to condemnation." The con-

¹ Burrell, 165.

² Burrell, 165: this appeal was subsequently withdrawn, the Lords affirming the decrees of the judge below.

³ *The St. Juan Baptista* (1757), Burrell, 164.

cluding words of this judgment—if such it may be called—implying an alternative ground of condemnation, would, if they stood alone, be entitled to little weight. But when similar words, “or be otherwise confiscable,” are found in a similar case—*The Maria Teresa*¹—it appears they are not mere surplusage. Had the goods been enemy property they would have been condemned on that ground. Must we not then assume that the court’s alternative judgment was on the basis of neutral ownership? The cargo in *The St. Juan Baptista* was not—with the possible exception of the logwood—of a contraband nature; nor was that in *The Maria Teresa*. What then had the court in mind? The facts persuade us to conclude that the alternative ground was condemnation for infringing the “Rule of 1756.” This implies that the transshipment and transfer of ownership were insufficient to break what was in the eye of the court one continuous transportation.

II

The Revolutionary and Napoleonic Wars.

This period is the most important in the early—perhaps in the whole—history of the doctrine. It is in these years that the doctrine becomes for the first time clearly enunciated by the court, and it is sought to be applied in cognate branches of the law.

The most succinct exposition of the rule is to be found in the judgment of Sir William Scott in *The Polly*² in 1800. “If an American (the neutral in question) is not allowed to carry on this trade directly, neither can he be allowed to do it circuitously.”³ Three years before, Sir James Marriott had expressed his view thus: “Neutrals may purchase of the enemy and carry to their own country—and then fairly export—but not directly from the Colony to the Mother Country.”⁴

The court was first concerned with the cases arising out of the application of this principle to the “Rule of War of 1756.” But almost at the same time it was sought to apply the doctrine in cases of breach of blockade, and within the next few years it was successfully introduced into the law concerned with the carriage of contraband and with cabotage or coasting trade.

In every case of the application of the doctrine of continuous

¹ (1759), Burrell, 204. In this case the character of the cargo is not specified, and the voyage is apparently to terminate at a neutral port. The sentence condemning the cargo was reversed on appeal, the evidence before the court being held insufficient.

² 2 C.R. 362.

³ *Ibid.*, p. 368.

⁴ In *The Eliza* (1797), Robinson, 2 Nich. 51.

voyage there must be, either in fact or intention, the interposition of an intermediate port, dividing the voyage or transportation into at least two parts. Is there any reason why a vessel should not be seized on the first part of such a voyage and condemned by a belligerent upon proof that in the intention of the owner or master the voyage was to be continued? It would seem that but for certain remarks of Lord Stowell in his judgment in *The Imina* ¹ and in the writings of several distinguished jurists ² little doubt as to the answer would have been entertained.

Lord Stowell in the case referred to held that articles could not be condemned as contraband unless taken *in delicto*, "in the actual prosecution of the voyage to an enemy's port." ³ Hall said that the court was always "careful not to condemn until what they conceived to be the hostile act was irrevocably entered upon; cargo was confiscated only when captured on its voyage from the port of colourable importation to the enemy country."

Lord Stowell's statement referred to cases of *contraband*: non-sequitur that it had any application to anything else. The case of *The Jesus*, ⁴ if satisfactory, is directly opposite in effect to that of *The Imina*. Nor does it appear clear that Lord Stowell would have followed his own judgment in that case in the later one of *The Twende Brodre* ⁵ had the facts been other than they were. In that case a cargo of timber, of such a nature that it would have been contraband had it been going to a naval port, was seized while on its way to a commercial port, St. Malo. It was urged by the captors that the ultimate destination was a naval port, Brest. Lord Stowell held, on the question of fact, that this was not the case. He said, however, that "it could never be permitted to be averred, that a cargo of this sort might go on an innocent destination to St. Maloes and then be sent on to Brest or Rochfort. If that were the case, it must be pronounced a case of condemnation . . .!" ⁶ What was this but a declaration that in the learned judge's view articles might suffer condemnation as contraband if their ultimate destination would give them that character, although the voyage on which they were seized was innocuous? ⁷ If the cases are examined in which the question is other than one of contraband, the difficulty does not appear to arise. The cases

¹ (1800), 3 C.R. 167.

² Cf. especially Hall, *International Law*, 8th ed., p. 799.

³ *The Imina* (1800), 3 C.R. 168.

⁴ (1756), Burrell, 165.

⁵ (1801), 4 C.R. 33.

⁶ *Ibid.*, p. 38.

⁷ It is difficult to see how the question of the doctrine of continuous voyage can ever arise in connexion with contraband unless seizure takes place during the first phase of the transportation.

of *The Jonge Pieter*¹ and *The Vier Gebroeders*² are in point. These cases are discussed in detail elsewhere; it is sufficient here to say that they were cases of ships seized on the first part of the voyage for alleged breach of blockade. In the first case the court held that there was no breach *because the second part of the transportation was by land*: but in the second the ship and cargo were condemned. But it is interesting to note that the cargo in *The Jonge Pieter* suffered condemnation on another ground, namely that it was British property destined circuitously to the enemy. For this offence also, then, the court was prepared to enforce the full penalty, although the immediate port of call was neutral.³

Thus we see that if the case was one of blockade, trading with the enemy and, perhaps, contraband, the court was prepared, provided that the evidence as to the intention of the party was sufficient, to decree condemnation even if seizure took place on the first part of the voyage. A case which stands alone may not be sufficient authority to settle the law, but if that case is supported by others in which the facts are closely analogous, then the onus is upon those who dispute the rule so laid down. The cases on this point which have been cited are sufficient, it is submitted, to establish that the judgment of the Lords in the case of *The Juno*⁴ in 1808 was no arbitrary one, but was one declaratory of the existing law and practice. This is the case of an American vessel on a voyage from a French colony to America and seized on the ground that the ultimate destination of the ship was a French port. The report, so far as it is material, is as follows:

Lords: "Voyage by an American from Havannah to Providence and Europe—intended to call in America—taken in the first Branch of the voyage—held illegal."

III

We propose now to consider the application of the doctrine in cases of carriage of contraband, blockade, and cabotage.

(A) *Continuous voyage and the carriage of contraband.*

As has been submitted in the previous chapter, the first reported case in which the doctrine of continuous voyage was applied was one touching a cargo in part contraband. That was the case

¹ (1801), 4 C.R. 79.

² (1804), 5 Nich. 324; Arn. 42.

³ A similar decision was arrived at in *The Chesterfield* (1804), Nich. app., Arn. mss., 20 July, where the cargo was seized on the first portion of a three part transportation.

⁴ Nich. app. 104.

of *The Jesus*.¹ It is not necessary to consider again that case in detail. It is sufficient to say that a neutral vessel was captured while on a voyage from one neutral port to another with a cargo a part of which consisted of saltpetre. This saltpetre was condemned as contraband both in the court of first instance and on appeal. The sole ground on which it appears that the court could have reached this decision was that this part of the cargo was destined to France.² The question does not appear to have arisen directly during³ the Napoleonic Wars, but reference was made to it in 1801 in the case of *The Twende Brodre*.⁴ *The Twende Brodre* was a Danish vessel seized on a voyage from Christiansand to St. Malo with a cargo of timber. The captors sought condemnation of the timber (apart from a portion which was protected by treaty) on the ground that it was contraband. This the claimants opposed, bringing evidence to show that the wood was unsuitable for naval purposes. The evidence on this point being far from satisfactory, the court held that the test of the legal nature of the timber would be the character of the *terminus ad quem*—whether a commercial port, St. Malo, or as was suggested, a naval port, Brest. Sir William Scott in the course of his judgment said :

“ If there had been a clear and determined destination to Brest . . . it would, according to the interpretation I incline to adopt, subject every part of the cargo, except the fir planks (which were free by treaty) to confiscation ; for it could never be permitted to be averred, that a cargo of this sort might go on an innocent destination to St. Maloes and then be sent on to Brest or Rochfort. If that were the case it must be pronounced a case of condemnation . . . ”⁵

Thus the court was clearly prepared to apply the doctrine, but as the true destination was held to be St. Malo, the above statement is *obiter*.⁶

(B) *Continuous voyage and blockade.*

The extension of the doctrine of continuous voyage to the case of blockade, often attributed to the United States' courts in the

¹ (1756), Burrell, 165.

² *Supra*, p. 66.

³ As has been pointed out before, the doctrine cannot be applied so as to secure condemnation for carriage of contraband unless seizure be on the first portion of the voyage : *The Asia* (1807), 7 Nich. 342.

⁴ 4 C.R. 33.

⁵ *Ibid.*, p. 37.

⁶ It has been suggested that *The Zelden Rust* (1805), 6 C.R. 93, is a case of carriage of contraband in which the doctrine was applied. (H. W. Briggs, *The Doctrine of Continuous Voyage* (1926).) Corunna, a commercial port, and Ferrol, a naval port, are in the same bay, and Sir William Scott condemned a cargo of cheese as contraband on the ground that its real destination was Ferrol although it was consigned to Corunna. It appears that this was a decision on the special facts of the case, and that the judge had not the doctrine of continuous voyage in his mind at all.

course of the Civil War, was, in truth, made by Lord Stowell a full half century earlier.

The question does not appear to have arisen before 1801. In that year three cases of what we should now call continuous transportation¹ came before Sir William Scott. The earliest, *The Ocean*,² Parker, was the case of a neutral ship seized while on a voyage from Rotterdam to America, with a cargo which, it was alleged, had come in the first place from Amsterdam, then a blockaded port. It was urged on behalf of the captor that this was an exportation from Amsterdam. In the course of his judgment Sir William Scott said :

“ The legal consequences of a blockade must depend on the means of blockade, and on the actual or possible application of the blockading force. On the land side, Amsterdam neither was or could be affected by a blockading naval force. It could be applied only externally. The internal communications of the country were out of its reach, and in no way subject to its operation. If the exportation of goods from Rotterdam was at this time permitted, it could in no degree be vitiated by a previous inland transmission of them from the city of Amsterdam.”³

*The Stert*⁴ was a case in which the facts were similar. At a time when the port of Amsterdam was under blockade, goods were sent from that city to Emden by inland canal navigation and thence shipped to America, on which part of the transit they were captured. Here also the goods were set free on the ground that *The Stert* was engaged in an inland voyage. It is of importance, however, to note the concluding remarks of Sir William Scott’s judgment :

“ In laying down this rule as applicable to the present case, I proceed upon the supposition, that this was a real *inland navigation*, and not a navigation over the Watt, the character of which might be subject to a different signification ; conceiving this to be a cargo which had gone to Emden on neutral account, by an internal canal navigation, where no blockade existed, I shall hold it free of all consequences of blockade ; allowing the captors their necessary expenses, upon the particular facts of the case.”⁵

In neither of these cases was the doctrine applied, but it seems clear that Sir William Scott thought it no extraordinary thing that it should be sought to be introduced, and it further appears from the concluding words of his judgment in the last case that had both stages of the transit been by sea he would have applied it himself. This view is confirmed if we compare other reports of

¹ Sir Samuel Evans used the expression in *The Kim* (1915), B. and C. Prize Cases, p. 478.

² 3 C.R. 297.

³ *Ibid.*, p. 299.

⁴ (1801), 4 C.R. 65.

⁵ 4 C.R. 65.

this case with that of Christopher Robinson. According to Robinson's account, Scott merely said that navigation over the "Watt"—the name then given to the open water between the West Frisian Islands and the Dutch coast—might be subject to a different rule. According to Nicholl¹ his words were: "if by the Watt passage—which a sea passage—would not be entitled to this benefit . . .", and this rendering is supported by Arnold:² "If by Watt, which consider an external passage, not hold privileged by this general principle."

The third case is that of *The Jonge Pieter*.³ The case—the more important aspect of which will be considered later—is noteworthy for certain remarks of Lord Stowell, which, though strictly *obiter*, are evidence of what his judgment would have been had the facts been somewhat different. The question here again was the legality of a voyage to Emden with a cargo destined to go on by inland transportation to the blockaded port of Amsterdam. "The blockade of Amsterdam is," he said,⁴ "from the nature of the thing, a partial blockade, a blockade by sea; and if the goods were going to Emden, with an ulterior destination by *land* to Amsterdam, or by an *interior canal navigation*, it is not, according to my conception, a breach of the blockade."⁵

The first case of what may properly be called continuous voyage in relation to blockade which came before the court was that of *The Vier Gebroeders*,⁶ in 1804. The vessel was bound for Toningen, where the cargo was to be transhipped into smaller vessels which were to carry it through the Watt passage to the Elbe, which was blockaded. *The Vier Gebroeders* having been seized on its way to Toningen, the Court held that the vessel was engaged in an attempt to break the blockade and condemned both ship and

¹ 4 Nich. 220.

² 29 Arn. 8.

³ 4 C.R. 79; 4 Nich. 264, 280; 28 Arn. 95; 29 *ibid.* 64.

⁴ 4 C.R. 83.

⁵ Cf. the other reports of this case. "Blockade only by sea—and sending the goods to Emden to be forwarded by land or by inland navigation—not a breach, but open by land;" 4 Nich. 280. In Arnold's report (29 Arn. 64) the court referred to the cases of *The Stert* and *The Ocean*, Parker, and said, "Neutral sends to neutral port and if the goods sent afterwards to port blockaded but by passage not blockaded—penalty not attach". In one other case in the same year was the question raised. The details of this case, *The Nicolay and Martha* (28 Arn. 93), are not very clearly stated, but it appears that the argument was the usual one that the cargo ought to be confiscated on the ground that even if the ship was bound to a non-blockaded port the cargo was to be forwarded to Amsterdam, then under blockade. The court, however, restored ship and cargo on the short ground that there was an intention on the part of the claimant to dispose of the goods at the free port of Rotterdam.

⁶ 5 Nich. 324; 33 Arn. 42.

cargo. From this time¹ this view of the law prevailed. Sir William Scott justified the rule in *The Maria Monse*s :²

"This ship was taken on a voyage from Varel to America, having on board a cargo that had been sent from the Weser to the Jade in lighters, and there transhipped . . . It cannot be doubted then on general principles, that these goods would be subject to condemnation, as having been conveyed through the Weser ; and whether that was effected in large vessels or small, would be perfectly insignificant. That they were brought through the mouth of the blockaded river, for the purpose of being shipped for exportation, would subject them to be considered as taken on a continued voyage, and as liable to all the same principles that are applied to a direct voyage, of which the *terminus a quo* and the *terminus ad quem* are precisely the same as those of the more circuitous destination . . ." ³

There was no relaxation⁴ in the case of *The Charlotte Sophia*,⁵ where the facts were similar and the vessel and cargo were duly condemned. This case was affirmed in the Lords, where it was held that a ship committed a breach of the blockade "from the Elbe to Brest by going over the Watten from Bremen and Hamburg to Tonningen (i. e. Tonning), the ship having been engaged at Bremen—and the cargoes sent to be put on board at Tonningen destined to a hostile port."⁶

It thus appears that under Lord Stowell's guidance the conception of a continuous voyage was made applicable in cases where breach of blockade was alleged. It was applicable whether the alleged breach was inwards or outwards. But there was one important limitation : Lord Stowell held that a sea blockade, being by its very nature external, was incapable of affecting the legality of an internal transportation to the blockaded port. Hence, put shortly, the court at this period held that a continuous sea voyage, but not a continuous transportation (including both land and sea) to—or from—a port under blockade would be a ground of condemnation and confiscation.

(C) *Continuous voyage and cabotage.*

During this period the doctrine was applied to that form of trading known as cabotage or the coasting trade in the cases

¹ A year earlier (in 1803), in the case of *The Catherine Louisa* (5 Nich. 197), the court held that "going to Heligoland not a breach of the blockade—unless clear it was with the intention of proceeding to the Elbe or Weser". But what the facts were is not clear.

² (1805), 6 C.R. 201.

³ 6 C.R. 203. As in other places Nicholl's report is a little more positive : "If no correspondence with this government should have no doubt that this a breach of blockade—would be continued voyage—otherwise the blockade would be wholly ineffectual." (6 Nich. 236.)

⁴ As there was none in *The Lisette* (1806), 6 C.R. 387 ; 7 Nich. 262 ; 37 Arn. 46.

⁵ (1806), 6 C.R. 204 n. ; see also *The Silenus* (1807), 7 Nich. 150 ; 36 Arn. 76.

⁶ Nich. app. 108.

of *The Ebenezer*¹ and *The Martha Van Comminga*,² both in 1806. The applicability of the doctrine was therein taken for granted.³

IV

The Question of Proof.

The doctrine having been established, the question whether the rule applied in a particular case was one of fact. The usual question was whether the voyage alleged by the captor to be the true one was "broken." Whether, in other words, the voyage upon which the vessel was then engaged was or was not part of a noxious whole.

Upon this point two questions arise. What did the court mean by a "break," and what proof must the claimant bring to establish such break? As to the first point the requirement of merger in the common stock of the country where importation was alleged was not expressed in terms until the latter cases of this period. But without formulating such a test the court had, in the earlier cases, if one may so express it, such a test latent in its mind. In many of the earlier cases it was unnecessary for the court to do more than adopt a negative attitude; it had merely to hold that such behaviour was insufficient to break the continuity of the voyage without having to lay down what behaviour would suffice.

It is of interest, however, to trace out as far as possible how it was that the court came to formulate this requisite of merger in the common stock. Many acts of the neutral were urged to be sufficient evidence of the termination of a prior voyage. Some of these acts—and they were many and various—the court merely held to be insufficient; but with some it was satisfied. However, it was careful to reserve to itself the right, if need be, of going behind such behaviour when it considered the neutral was not acting *bona fide*.

¹ 6 C.R. 250; 6 Nich. 325; 35 Arn. 56.

² 35 Arn. 66. Probably also in the case of *The Henrietta* (1802), Nich. app. 62. In *The Hoop* (1800), 3 Nich. 329, an unsuccessful attempt was made to deprive the captor of expenses on the ground that the goods had come first from a neutral port.

³ It was not to be expected that the nature of a non-contraband cargo would affect the application of the rule, but is perhaps of interest to note that the doctrine has been applied where the cargo was human in character: *The Christina* (1803), Nich. app. 74: "Lords hold that a Dane trading in slaves from America (not a Danish settlement there) to the Havannah was illegal, and that delivering some of the slaves at St. Thomas did not break the continuity of the voyage."

What constitutes a break in the voyage?

What was, and what was not, sufficient to constitute a break in the voyage? Various acts of the neutral shipper were urged on his behalf as sufficient. These acts fall roughly into three groups: transshipment, sale, and importation.

(i) *Transshipment.*

The only case¹ in which it appears that a "bare" transshipment, i. e. a transshipment without a sale or change of possession of the cargo, was set up, was that of *The Eagle*,² Terry. A cargo of sugar and cotton had been brought from Guadeloupe to New York and was there transhipped to *The Eagle*, which then set sail for Cherbourg. As was to be expected the court condemned the cargo.³

(ii) *Sale.*

The neutral then contended that the sale of the cargo at an intermediate port was sufficient. As the practice of the court was not always the same, it may be of interest to consider the cases bearing on the subject.

The point had been raised in one case which occurred some time before the period we are now considering. In this case,⁴ which has been referred to at length before,⁵ it was held that an actual sale "for a consideration really paid" *if merely to continue the original voyage* was a mode of unfair assistance which did break the continuity of the original voyage. The court had not to consider the case of a *bona fide* sale.

A *bona fide* sale was considered in the next case, that of *The Penelope*,⁶ in 1801. The report of this case, which came before the Lords, is short, but it appears that a cargo of colonial produce was brought from a Spanish colony to Charlestown, where it was

¹ In *The Charlotte* (1799), 22 Arn. 1, a cargo of enemy colonial produce had been transhipped at New York to an American vessel to carry to Amsterdam. The court ordered further proof as to whether the goods were enemy property or advantage was merely being taken of the American flag.

² (1805), 6 Nich. 172; 34 Arn. 81.

³ Nicholl's report: cf. *The Minerva* (1807), 7 Nich. 324: "General principle that mere transshipment does not break the voyage in furtherance of an original intention." The question was also discussed in *The Birmingham* (1794), Nich. app. 7.

⁴ The *Yong Vrow Adriana* (1758), Burrell, 178. The fact of this case not being one of continuous voyage does not affect its value on the point now under consideration.

⁵ *Supra*, p. 65.

⁶ Nich. app. 51; Arn. mss. 11 June 1801. See also the case of *The Sally*, 1806 (35 Arn. 24), wherein a cargo of logwood was restored in what appeared to be similar circumstances: but the report is not satisfactory.

sold, transhipped, and sent on to Malaga. The Lords held that there was here a clear transfer of property, and they directed restitution to be made.

In the following year the three cases of *The Carl Walter*,¹ *Potrimpos*,² and *Doris*,³ were considered together by Sir William Scott. In these cases Spanish hides were brought to the Tagus, where, without being landed, they were sold and transhipped to be carried to St. Andero. Sir William Scott came to the conclusion that the sale was not done in the fair course of trade, but he went on to say that even had it been genuine it would not have availed as a defence to the captor's claim. He said :

" . . . There was no such importation into Lisbon as would justify a sale, since it has been repeatedly determined that, in time of war, property cannot be legally transferred and changed *in transitu*. There is, I think, reason to conclude, that there has been no *bona fide* importation ; and, if so the fact of sale would not avail, even if it had actually taken place. The goods would still be liable to be considered in the same light, as if they had been taken *in transitu* on their original destination." ⁴

In *The Jungfer Charlotta* ⁵ a cargo of salt was condemned, although this salt was sold to pay expenses incurred at Oporto, into which neutral harbour stress of weather had driven the vessel. But here again the sale was held to be not *bona fide* but fraudulent.

Hence we may say that up to the year 1808 no court had condemned a cargo on the ground that a *bona fide* sale failed to break the continuity of the original voyage. But we have dicta of Sir William Scott to the effect that such a sale without prior importation would be without effect. We may note, however, that within the previous five years it had been held in two cases ⁶ that the continuity of a voyage was broken if the cargo was merely *landed* and *offered* for sale, and in another case ⁷ the cargo was restored where it had been neither imported nor even landed. The point was not, it seems, finally decided until the case of *The Thomyris* ⁸ in 1808.

The Thomyris was an American vessel taken on a voyage from Lisbon to Cherbourg with a cargo which was transhipped in the

¹ 4 C.R. 207.

² 4 C.R. 213.

³ 4 C.R. 213. Affirmed, Nich. app. 93 ; Arn. mss. 3 Aug. 1805.

⁴ 4 C.R. p. 112.

⁵ (1807), reported in the court of first instance, 37 Arn. 81. On Appeal, in 1 Act. 171—where the grounds of the judgment are not stated, and in Nich. app. 110, and Arn. mss. 15 Dec. 1809, in each of which there is a note of the judgment.

⁶ *The Eagle*, Weeks (1803), Nich. app. 75 ; Arn. mss. 15 May 1802, followed in *The Palinurus* (1806), 7 Nich. 19 ; 35 Arn. 118 ; see also *The John*, Mosher (1809), 1 Act. 39.

⁷ *The Schoone Sophie* (1805), 6 C.R. 251 n. ; 6 Nich. 147.

⁸ Edw. 17.

Tagus from a vessel from Alicant. The justification was sale and transhipment. Sir William Scott, after saying that the transhipment alone would not break the continuity of the voyage, and that, on the other hand, a sale is generally satisfactory evidence of an importation, held that

“it has never been decided that when goods are brought to an intermediate port, not *animo importandi*, but sold whilst waterborne, and there transhipped, such sale with transhipment makes a new exportation from the port in which it is transacted. In order to constitute an exportation, there must have been a previous importation, in the case of commodities not native ; where a cargo is sold to be immediately transhipped and exported, that can never be considered as any importation at all ; it is all one act, of which the sale and the transhipment are only stages ; they lengthen the chain, but do not alter its direction.”

So far, then, sale fails to break the continuity because it is not conclusive evidence of importation. But another reason is added :

“He (the vendor) therefore brings the goods from the enemy’s country without any intention of importation on his part, and instantly transfers them for the known purpose of conveying them to another port of the enemy. The buyer purchases them yet unimported from the enemy’s country, and sends them forward on his own account to a port of the enemy. How far does this differ from a sale on the high seas ? ”¹

This is a return to the opinion expressed *obiter* in *The Carl Walter*.

It thus seems that a sale at a neutral port, with or without transhipment, was held to be insufficient to break the continuity of the original voyage only after some difference of judicial opinion.

(iii) *Importation.*

Importation as an act which would break the continuity of a voyage was at the beginning of this period only one of the means of achieving this end. It rapidly increased in importance, and quickly triumphing over its rival—sale—ultimately established itself as the sole effective means.

But, although the distinction may seem a little pedantic, it is useful to notice that “importation” at the end of this period meant something different—something more—than it did at the beginning. Importation means bringing goods into the country—that, and no more—and, provided that the transaction was a genuine one, this is what the court probably meant. But neutral frauds compelled them to add something more, so that they now required importation into the “stock,”² “trading stock,”³ or

¹ A like decision was given in the cases of *The Two Marias* (1809), 39 Arn. 114, and *The Stork*, Cornell (1810), Nich. app. 115.

² *The George Washington* (1805), 6 Nich. 186.

³ *The Freundschaft* (1805), 34 Arn. 63.

“common stock”¹ of the country. Thus in strictness importation was not enough; importation *and* admixture with the goods of the country were necessary.

Importation was clearly an obvious way of putting an end to a voyage, and it received judicial sanction as early as 1797.² The importation had to be genuine—the court usually used the expression “*bona fide* importation”—and this raised the question of definition. A *bona fide* importation was the bringing of goods into the country with the intention *at the time they were brought* of disposing of them there. Thus the intention of the importer was the fact which determined the character of the importation. Hence all evidence of the genuineness of the importation was really directed towards the intention of the importer.

Every case was considered on its own merits, but it was natural that in the absence of allegations of fraud certain tests were set up by the court which, if they were fulfilled, were *prima facie* evidence of the intention of the importers. But compliance with these tests was never conclusive evidence; the court was always free to require further proof. “If the evasive purpose be admitted or proved, we can never be bound to accept as a substitute for the observance of the law the means, however operose, which have been employed to cover breach of it.”³

An importation meant, in general, landing of the goods and the payment of import duties, and, in the absence of evidence to the contrary, proof of these acts was accepted as satisfactory evidence of a genuine intention to import.⁴ The presumption is stronger where the goods are also warehoused and offered for sale.⁵ But where a cargo was landed and weighed and then brought back on board, the evidence was held insufficient,⁶ as it was in the case where a cargo had been landed and bonded for a fortnight.⁷ The production of fresh clearances⁸ or fresh papers⁹

¹ *The Maria* (1805), 6 C.R. 201

² In *The Eliza*, Robinson, 2 C.R. 51; see also *The Active* (1794), 1 Nich. 84, in which Sir James Marriott held that “no belligerent shall avail himself of a trade not legal before the war—but a great and delicate point. Not give an opinion whether a non-belligerent may not stop and buy fairly in market overt.” The voyage was from Philadelphia to France, and the cargo consisted of French colonial produce.

³ *The William* (1806), 5 C.R. 385.

⁴ *The Eliza*, Haff. (1804), 5 Nich. 248. Cf. also Sir William Scott in *The Polly* (1800), 2 C.R. 369.

⁵ *The Eagle*, Weeks (1803), Nich. app. 76.

⁶ *The Ambition* (1806), Arn. mss. 25 March 1809.

⁷ *The Freeport* (1803), Arn. mss. 19 March 1803.

⁸ *The Mercury* (1802), 4 C.R. Appendix A. p. 6; *The Fame* (1805), 6 Nich. 201; *The Pegasus* (1803), Nich. app. 7.

⁹ *The Mercury* (1800), Arn. mss. 28 July 1800, and 13 Jan. 1802.

alone was clearly not enough, but a fresh clearance together with proof that the vessel had remained five weeks in port with the cargo unladen was held sufficient, on the ground that it was evidence of a *bona fide* intention to import which was afterwards changed.¹ But the intention to sell must not be contingent upon the finding of a good market : *The Paulina* (1806).²

The evidence of importation most generally brought before the court was that of landing the cargo and paying duties, and it was argued in *The William* ³ in 1806 that American merchants had been led to believe that proof of landing and payment of duties in America would, in every case, be held absolutely decisive of the legality of the voyage. In that case the cargo had been landed and the duties paid, but at the same time a debenture had been granted by way of drawback which in effect extinguished almost the whole of the duties that had been previously secured. No case was cited by the claimants which supported their contention, and the court held on the authority of earlier cases that it was entitled to go behind the evidence produced and call for further proof.⁴ On the question of the drawback the court asked :

“ But supposing that we had uniformly held that the payment of the import duties furnish conclusive evidence of importation, would there have been any inconsistency or contradiction in holding that the mere act of giving a bond for an amount of duties, of which only a very insignificant part was ever paid, could not have the same effect as the actual payment of such amounts ? ” ⁵

On the other hand the fact of a drawback being received was not conclusive *against* a genuine importation if there was other evidence of the intention to dispose of the goods.⁶

¹ *The Schoone Sophie* (1805), 6 C.R. 251 n.

² 7 Nich. ; 36 Arn. 49.

³ 5 C.R. 385.

⁴ Besides the cases cited in the judgment, the court might have referred to *The Maria*, Jackson (1805), 6 Nich. 174 : “ Not a novel principle but before settled must be an importation into the stock of the country, not mere landing and securing duties.” In this case further proof was ordered of an alleged attempt to sell in America. In *The Aurora*, Bowers (1804), Arn. mss. 1 June, and *The Little Cornelia* (1805), 6 Nich. 214, it was held that landing and payment of duties were not conclusive. The landing of the cargo and the payment of duties was also held insufficient in *The Enoch* (1805), 6 Nich. 130, and in *The Hope*, Robinson (1805), 6 Nich. 162, and the landing and securing the duties in *The Essex*, Orne (1805), Nich. app. 91, and in *The Rowena* (1805), Nich. app. 104.

⁵ 5 C.R. 404.

⁶ *The Respect*, March (1807), 36 Arn. 87.

V

Conclusions.

It is submitted that an examination of the cases discussed in this article justifies the following conclusions :

1. The doctrine of continuous voyage was first applied in the year 1756 in the case of *The Jesus*.

2. The doctrine with which the courts were concerned was really that of "continuous transportation" rather than "continuous voyage."

3. The doctrine was not only known but was familiar to the judges of this country by the year 1805.

4. It was during this period that the doctrine was first applied in cases of :

(a) Contraband, 1756,¹

(b) Blockade, 1804,²

(c) Cabotage, 1806.^{3 4}

¹ *The Jesus*, p. 65, *supra*.

² *The Vier Gebroeders*, p. 72, *supra*.

³ *The Ebenezer*, p. 74, *supra*.

⁴ As to the application of the doctrine in cases arising out of the rule against trading with the enemy see *The Jonge Pieter* (1801), 4 C.R. 79, where articles shipped in this country on a vessel bound for Emden were confiscated because the court held it was intended that they should on arrival be forwarded to Amsterdam, an enemy port. The same consequence was held to attach to goods which were dispatched in a British ship with the intention that at Rio de Janeiro they should be transferred to a Portuguese vessel which would carry them to Spanish territory (*The Chesterfield*, 1804, Arn. mss. 20 July).

DO WE NEED AN INTERNATIONAL CRIMINAL COURT ?

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THE Advisory Committee of Jurists who prepared the draft Statute of the Permanent Court in 1920 appended to their project a resolution which proposed the establishment of a High Court of International Justice with competence "to try crimes constituting a breach of international public order or against the universal law of nations, referred to it by the Assembly or by the Council of the League of Nations." The court was to have power to define the nature of the crime, to fix the penalty, and to decide the appropriate means of carrying out the sentence, as well as to formulate its own rules of procedure. To this part of the Committee's proposals the Assembly of the League of 1920 gave short shrift, on the grounds that criminal cases are best entrusted, as at present, to the ordinary tribunals ; that if crimes of this kind should in future be brought within the scope of international tribunals, a criminal division of the Court of International Justice should be set up for the purpose ; and that in any case consideration of the problem was premature.

As a proposition of immediate practical interest this action of the Assembly has probably killed the proposal, but in non-official quarters it still attracts considerable support. The International Law Association has steadily supported the general idea of such a court at three meetings. At Buenos Aires in 1922 ¹ it resolved that the creation of an international criminal court was essential in the interests of justice, and that the matter was urgent. At Stockholm in 1924 ² the Association considered a draft statute presented by Dr. H. H. L. Bellot, and appointed a committee to examine the matter. At Vienna in 1926 ³ it adopted a revised draft by an overwhelming majority of those present. There can be no doubt of the depth and sincerity of the conviction of those in many different countries who sympathize with the proposal ; and there is a risk that the issue may come to be regarded as one between the obstructive conservatism of foreign offices and

¹ Report of the 31st Conference, p. 86.

² Report of the 33rd Conference, p. 110.

³ The Report of this Conference is not yet published.

progressive international thought. It may, therefore, be worth while to state some reasons for thinking that an international criminal court would be neither a desirable nor a practicable development of international organization.

If such a court were established it might take various forms. It might be a court of original jurisdiction or a court of appeal from national tribunals; it might be a new and separate international institution or a division of the existing court; it might be made competent only in cases referred to it by the League, as the Committee of Jurists proposed, or it might be open to any state or even to an individual to prosecute cases before it. But as long as it has not been decided that an international criminal court of some kind should be established, the various forms of the proposal need not be particularly discussed.

The motive power behind the proposal for a criminal court of some kind appears to be the conviction that it would afford, if not a wholly satisfactory, at any rate a better method than any we now employ of dealing with offences against the laws of war. Dr. Bellot, for example, in commending the idea to the Buenos Aires Conference of the Association, says that "the crying need for the creation of a Permanent International Criminal Court . . . will best be realized by an examination of the history of the various attempts to secure the trial and punishment of war criminals after the conclusion of war."¹ Lord Phillimore, in an article in this Year Book,² has divided crimes against the law of nations into (1) those committed in time of peace, for which he thinks an international tribunal is not required; (2) the crime of declaring an unrighteous war, but he thinks that the forces making for war are so complex that an international tribunal would only be appropriate here, if at all, for dealing with a personal autocrat; the jurisdiction might be created as a deterrent, but would rarely be exercised; and (3) crimes committed in time of war, which Lord Phillimore regards as peculiarly matters for an international court of criminal justice.

That the problem of dealing with war crimes is immensely difficult, and that existing methods are ineffective, partial, and in general about as unsatisfactory as they could well be, may be at once conceded. Lord Cave,³ although he is not a supporter of an international criminal court, has explained very forcibly what the

¹ Report of the 31st Conference, p. 63.

² 1922-3, p. 79.

³ Address on "War Crimes and their Punishment"; *Grotius Society Transactions*, Vol. VIII, p. xix.

difficulties are. He points out that while a war continues, there are at present remedies which it is not difficult to apply, but whose application is very limited; reprisals, he says, are not really punitive, but preventive (and experience shows, it may be added, that they are as likely to lead to a mere competition of barbarity as to prevent it); trial and punishment by military courts is only possible when the actual offender is captured by the other side. Generally punishment must be deferred until peace is made, and then new difficulties arise. The vanquished belligerent, Lord Cave suggests, may be unwilling to surrender offenders, or they may have taken refuge in a neutral country; the victor's municipal law may provide no punishment for the act; there may be difficulties of venue, and so on. Lord Cave's remedy would be to codify the criminal law of war, by international action if that is possible; if not, we should frame our own code, enforce it strictly during the war by reprisals or otherwise, and, if we are victorious, demand the surrender of offenders after the peace. Perhaps some day their trial might be entrusted to the Court of International Justice, but the time for that has not yet come. Trial by the offender's own national courts is not satisfactory, as the Leipzig trials have demonstrated. The least objectionable course would be, while leaving a right of trial to the courts of the territory where the crime was committed, to give a collateral jurisdiction to those of the Power against whose nationals it was committed, perhaps with a right of appeal on points of international law to the Hague Court.

In the debate which followed this address Sir Reginald Acland described the scheme as "perfectly admirable from the point of view of the victor"; to which Lord Cave, admitting the difficulty of applying it impartially to victor and vanquished, replied, "if my learned friend will make any other suggestion for meeting the difficulty, I shall be one of his most attentive hearers." The truth is that all the methods hitherto suggested for dealing with war criminals are open to objection; the existing methods are bad; it will not do to rely on trial by their own courts; and it would be even more objectionable to hand them over to the courts of the victor, both because of the very real risk of injustice, or, what would be almost as bad, suspected injustice, and still more because such a plan is one-sided. But it does not follow that, because a process of elimination seems to drive us back on the idea of an international tribunal, a solution of the problem will be found there. It may be that there is no solution.

We are entitled to ask in what particular respect the institution of an international criminal court would improve the present position regarding war crimes. Lord Phillimore¹ has disclaimed any desire to set up a court of vengeance after a war; and it is difficult to think of any really valuable service that the court could render, unless we are to believe that it would have a *deterrent* effect. But to suppose that men who are tempted to commit war crimes during the course of a war will be strengthened to resist the temptation by the thought that at some future time they may have to account to an international court is probably altogether to misconceive the motives which affect the mind of the intending war criminal, ranging as these do from a lofty patriotism to the mere satisfaction of lust or cruelty. The nobler class of war criminal would probably regard the possibility of ultimate punishment, if he regarded it at all, as adding the attraction of martyrdom to the compelling sense of patriotic duty; the baser would realize that the prospect was remote in time and the chances of avoiding it high. It is hard to imagine a case in which the deterrent effect during a war of the institution of the court would not be practically negligible.

This question of the probable psychological effect of the institution of a criminal court is typical of the differences which divide supporters and opponents of the scheme, for these are often not so much matters for argument as of temperament and instinctive judgment. For example, one cannot weigh the comparative claims of that righteous instinct which makes us desire to see justice prevail against the lawbreaker, with that which makes us recoil from the prospect of prolonging the bitterness of war into a time when both sides should be re-knitting broken ties of friendship rather than brooding over the past. Sir Graham Bower,² at the Conference of 1924, put a point of view, which is entitled to more attention from the supporters of the court than it seems to have received, when he said that their proposal meant that "when the soldiers and sailors have finished fighting, when they are ready to shake hands over a treaty of peace, then the lawyers are to begin a war of accusation and counter-accusation and recrimination."

It is not putting the matter too high to say that if the proposed court had been in existence at the close of the last war, and had carried out the task which would have been laid upon it, we should probably not yet have heard of the Locarno policy.

Again, it may be assumed that no one would support the insti-

¹ Report of the 33rd Conference, p. 97.

² *Ibid.*, p. 95.

tution of an international criminal court unless he felt some confidence that the obligation to surrender accused nationals for trial, once it had been undertaken, would really be observed; but whether this is probable or not is again not a matter for argument, but of appreciation of the probable behaviour of one's fellow men. But it will not do to lose sight of two vital facts; firstly, that many of those whose surrender will be required are likely to be national heroes in the estimation of their own people, and secondly that the obligation will fall due to be honoured either in the exaltation of victory or in the bitterness of defeat, but at any rate at a time of the intensest national emotion. We know that the Allies in the plenitude of their victory could not secure the surrender of the accused persons whom the Treaty of Versailles entitled them to demand, for the simple reason that the German people, prostrate though they were, would not have it so; that the Allied peoples would have been less stubborn in the like case is inconceivable. No doubt in theory the case would be different if the obligation were mutual, and if it were to surrender to the justice of an international body and not to that of enemies; but to argue that with those distinctions the difficulty would disappear is probably to misread the psychology of a people. There are practical limits in any modern state to the powers of a government to commit its people by treaty, and a promise to surrender all who are accused of breaches of the laws of war to the ignominy and jeopardy of a criminal trial by *any* court probably falls outside those limits.

On the more technical side of the actual organization of a system of international criminal justice the difficulties are also enormous. Matters such as the custody of the prisoner when within the jurisdiction of the court, the securing of the attendance of witnesses and the discovery of documents, the adoption of a procedure which would satisfy conflicting national views of how a criminal trial should be conducted, the execution of sentences, might just conceivably be adjusted, but only on the assumption of a general and sustained feeling that the court was necessary and of a firm determination to make it a success; at least such matters cannot be brushed aside as trivial. But the difficulty that arises out of the question what law the court should apply is greater than any of these. The Advisory Committee of Jurists recommended that the court itself should define the crime and fix the penalty, and Lord Phillimore, who was a member of the Committee, has told us that this idea was taken from the procedure

by which under the Belgian Constitution the Chamber may impeach a minister before the Court of Cassation.¹ As a very special procedure for dealing with highly-placed offenders, whose acts might otherwise fall outside the criminal law, such a power in a criminal court may be admissible ; no doubt also there is an analogy between such cases and those which the jurists contemplated would come before an international court, when they proposed to limit its jurisdiction to cases referred to it by the Assembly or the Council. But such a power could not properly be conferred on a court which is to try war criminals in general, unless it were intended to add to its judicial functions those of an international legislature in criminal matters. If the notion of a court with special legislative powers is rejected, there seem to be only two possible solutions of the problem of supplying the court with law to administer ; a code of the laws of war must be framed, or the court must be left to make the best of such laws of war as already exist. There are the strongest objections to either of these courses. It can hardly be necessary to-day to restate the objections to another attempt at codifying the laws of war ; ² we should at least take warning from the comparative futility of the pre-war codifications, and from the unratified fate of the rules formulated at Washington in 1922 and the subsequent Hague rules for aerial warfare. Moreover, there is a growing feeling that statesmen and lawyers do better to devote such attention as they can give to international law at all to improving the law of peace rather than preparing for the next war. On the other hand the feeling which led many after the last war to urge a restatement of the laws of war was sound to the extent that it implied a recognition of the proved inadequacy of the existing rules. That there are gaps in those rules is obvious ; there is, for instance, no scale of punishments for contraventions whatever, and topics of vital importance, such as the uses of new instruments of warfare like submarines, aeroplanes, and poison, and the whole question of the status of civilians, are either not regulated by existing rules at all, or regulated by rules which have become anachronisms in modern conditions of warfare. At the Vienna Conference it was suggested that an international court applying such law as exists would be much in the position of any English court under our system of building up the law by precedents, but the analogy will not hold.

¹ Year Book, 1922-3, p. 81.

² See a convincing statement of these objections in an article on " The League of Nations and the Laws of War " in this Year Book, 1920-1, p. 109.

Far the greater part of English criminal law is now statutory ; and in any case the discretionary powers which our law, statutory or not, allows to a judge in defining the constitution of a crime or fixing the sentence is not in the least comparable in extent to the extraordinarily wide discretion which would have to be entrusted to an international criminal court attempting to apply and develop such laws of war as exist at present. Nor again has a judicial body the qualifications which fit it to be the arbiter between the justified and the unjustified barbarisms of war.

War crimes are an invariable and an inevitable incident of war itself. Sometimes they are horrible, as war itself always is, but after all they are a trivial matter compared to the sum of the horrors that war brings. It is certainly in the nature of war that the innocent should suffer, and that is more shocking to a sense of justice than that the guilty should often go unpunished. The notion that war crimes can be banished from war or even appreciably reduced by the institution of a criminal court is probably a delusion, akin to that more general delusion which believes that war can be more or less humanized by law ; and even if this were not so, an international court to deal with war crimes after a war is over would still be undesirable, because the supreme need then is to calm the passions which the war has raised and to work for the prevention of another, and no conflicting aim is comparable in importance with that.

In principle, however, there is no reason why the jurisdiction of an international criminal court should be limited to, or should even include, jurisdiction over war crimes, but the possibilities of an international court for other criminal cases, particularly the relation in which such a court would stand to national courts, do not appear to have been worked out in detail. Dr. Bellot originally suggested ¹ that besides dealing with war crimes the court "should be competent to try criminal offences against law and order during peace time at the suit of any state, on behalf of its injured national, in those cases where such state has no jurisdiction over the alleged offender ;" but he later withdrew this proposal, and he can hardly have meant to suggest that if a crime were committed, say, against a Frenchman in England, the French Government might claim, without any limiting conditions, to take the criminal before an international court. There is only one class of criminal case the withdrawal of which from the territorial court, which is normally by far the most convenient court of trial,

¹ Report of the 31st Conference, p. 76.

would seem worthy of consideration, and that is the class of cases which have dangerous political repercussions in the international sphere. But what is this class? One can point to instances, the crime of Serajevo, or the murder of General Tellini, but the only common element which marks off such crimes from others is the fact that they do produce a dangerous political situation. It is this dangerous situation as a whole that calls for international action, and the action required is something much wider in range than a mere judicial inquiry into the crime, which is in fact only a minor element in a complex and essentially political crisis. For such crises we already have in existence the Council of the League, with its power of asking the International Court for an advisory opinion if it thinks fit; we need no new court for this purpose.

SPINOZA AND INTERNATIONAL LAW

By H. LAUTERPACHT, LL.D.

SPINOZA's contribution to international law does not exceed one thousand five hundred words,¹ and its direct influence on the science of international law in the following centuries appears to have been altogether negligible. Von Ompteda, the first scientific bibliographer of international law, mentions him, amidst some indignation at his doctrine,² in his enumeration of post-Grotian writers, but it is obvious that the reference is one for the sake of completeness only.³ He assigns to him a place even inferior to that occupied by Robert Sharrock, an author who wrote a few passages on the law of war in his exposition of the law of nature, but whose chief merit lies in championing Boyle's scientific discoveries and in having published a treatise on the *Propagation and Improvement of Vegetables by the Concurrence of Air and Nature* (1669). By asserting that international law owes to Spinoza next to nothing Ompteda was not merely giving vent to his disapproval of Spinoza's teaching. For there is no evidence to show that, with the possible exception, to be discussed later, of Pufendorf and some writers of minor importance,⁴ international lawyers knew of his existence, or, if they knew, that they cared to quote or to refute him. Bynkershoek, his countryman, while writing exhaustively⁵ on a subject on which Spinoza's views were not only

¹ Even this is a liberal computation considering that what he said on this subject in the third chapter of the Political Treatise (cited here as *P.*) is largely a repetition of the view previously expressed by him in the sixteenth chapter of the *Tractatus Theologico-Politicus* (cited here as *T.P.*). Spinoza was born in 1632; he died in 1677.

² *Litteratur des gesammten, sowohl natürlichen als positiven Völkerrechts* (1785), p. 265.

³ Ompteda's own words on the subject may usefully be quoted: "Among other philosophical and theological paradoxes, he also expressed some altogether detestable opinions on international law. He wrote namely a Theological-Political Treatise in which he attempted to undermine both natural law and the law of nations. With regard to the first he maintained that according to natural law a man may do everything that is in his power. By applying this view to relations between states he did not hesitate to hold that a state may, if it is only strong enough, attack its neighbours, and also, if it thinks it to be of advantage, dissolve at will its treaties of alliance and assistance. And, in order to show how far an otherwise sensible thinker may be led astray by the desire to propagate novelties, I shall cite the very words in which he puts forward those shameful doctrines."

⁴ Cf., for instance, J. J. Schmauss, *Neues Systema des Rechts der Natur* (1754), p. 270.

⁵ *Quaestiones Juris Publici* (1737), II, ch. 10.

diametrically opposed to his own, but also clear and emphatic, ignored him completely. His views on international law shared the fate of his political theory which was totally overshadowed by the acute controversy centring round his philosophical and theological doctrines.¹ The nineteenth century, during which much of the prejudice surrounding his teaching was swept aside, could not, in the very nature of things, bring any appreciable change in this particular respect. There was no prejudice to be overcome as far as his international doctrine was concerned. As it happened, the worst that could be said about it was not far off the mark. No wonder that text-books do not refer to him and that he has remained unknown to the student of international law.² On the other hand, those of his admirers who were engaged in expounding his political theory could not well pass over the embarrassing utterances, and, especially in this country, attempts were made to put on the much denounced passages a construction calculated to vindicate for them some semblance of inherent accuracy.³ It even came to pass that a very competent commentator of Spinoza, while discussing his relation to international law, allowed himself to be led astray by an inaccurate translation of a crucial passage in the Political Treatise and to maintain, on the strength of it, that Spinoza recognized an obligation of faith in international compacts.⁴

However, in spite of the negative results of the above survey of Spinoza's influence, it is believed that the attention paid to this aspect of his teaching may not be altogether without advantage for the student of the history and the theory of international law. There are several reasons which seem to justify such a belief.

The beginning of the nineteenth century witnessed the elevation of the doctrine of Machiavelli, notably of his conception of international relations, from the level of what had previously been

¹ This is well illustrated by the fact that Frederick II, the author of the well-known anti-Machiavellian treatise, while referring to Spinoza in the preface of his book, is obviously of the opinion that the latter's negative influence extended to the field of religion only: " 'The Prince' of Machiavelli"—thus begins the Preface—"is with regard to morality, what Spinoza's work is with regard to religion." (*Examen du Prince Machiavel avec des notes historiques et politiques* (1741)).

² Rivier in Holtzendorff's *Handbuch des Völkerrechts* (1885), I, p. 435, refers to him casually in his bibliographical article.

³ Menzel, *Spinoza und das Völkerrecht*, in *Zeitschrift für Völkerrecht*, II (1908), pp. 17-22. Professor Wolf, writing in *Chronicon Spinozanum*, Vol. II (1922) pp. 11 and 12, goes the length of maintaining that Spinoza was "a believer in the essential unity and solidarity of mankind," and that he saw in reason "the surest means of international conciliation."

⁴ See below p. 99.

a by-word and a widely resented challenge to the moral sense of man, to the dignity of an organic part of a comprehensive system of political theory. The separation of morals from politics and the identification of power with right—both constituted the main feature of Spinoza's theory of the state—began to permeate European political thought. At the same time Spinoza's general philosophy, hitherto the centre of barren controversies, became finally recognized as one of the foundations of philosophical endeavour. Is there any ground for holding that the simultaneousness of these achievements was one not only of time, but also of intimate connexion? Did the general acceptance of his philosophy have the effect of facilitating—by making them appear fit to form part of an imposing ethical and political system—the adoption of international doctrines which would have otherwise been rejected with scorn and abhorrence? It will be of interest to examine whether and how far Spinoza's views on international relations became part of those great systems of political theory which, although international lawyers of the nineteenth century remained ignorant of Spinoza himself, influenced the subsequent development of international law.

For the relation between political theory and international law is of a more pervading character than is commonly assumed. It is the ultimate results of the theory of the state which are resorted to by international lawyers as the foundation of their systems. A political doctrine based on the omnipotence and glorification of the state as an end in itself will naturally result, and has usually resulted, in the negation of the law of nations as a body of rules which, both in its binding force and in its creation, is independent of the will of the state. The present, still rudimentary, stage of international law is not in a small degree due to the prevalence of this type of doctrine. And the time seems as yet far off when the legal—and, of necessity, also the political and sociological—theory of the state will turn to international law as to the necessary starting-point of a truly scientific inquiry. Nevertheless, the philosophical bases of international law and its position among cognate social and legal sciences cannot be better illustrated than by disclosing the manner in which representative systems of thought ended in the treatment of the problem of relation of states to humanity, i. e. of their relations to one another. Of them Spinoza's views are the more instructive as he made it a point to apply here *more geometrico* the fundamental principles of his ethical and political doctrine.

Finally, there is, with regard to Spinoza, a special reason which adds interest to such an investigation. His negative attitude in matters of international law is to all appearance so pronounced that the student acquainted with the little ways of his method is inclined to suspect some hitch lurking in the background. Spinoza was a thinker who, it may seem, found delight in not leading his reader straight to the point. He wrote the *Tractatus Theologico-Politicus* with the avowed object of vindicating the ideals of political freedom and religious toleration, but he did it with such an acumen that the chief task imposed subsequently upon his commentators was to prove that the treatise was not a plea for despotism.¹ His political theory is to a large extent based on the identification of power with right, and, consequently, on conceding to the state a measure of authority over the citizen which is co-extensive with its power—a very doubtful way to establish the principles of freedom. It is only a subtle turn that saves the cause which he champions from being condemned out of his own mouth. The state's power, he says, and accordingly its rights, are limited by the nature of its commands. The state cannot, and therefore has not the right to, enact laws the enforcement of which entirely escapes its control. The success of his thesis was thus made to hinge on a dialectical device which, upon analysis, proves highly deficient in convincing power and utterly meaningless as a rule of action. For an attempt on the part of the governed to give, if need be, effect to this principle, is, according to Spinoza, a revolutionary act of war and of return to the state of nature—an act which he is all but eager to advise. And yet he was content to let his main contention rest on a foundation as frail as that. Is it probable that also with regard to what he said on relations between states there should be only one step between a mischievous idea and a constructive approach to a solution of the problem? Spinoza never expressly made this final step, but it will be of more than passing interest to inquire how far exactly he went in the right direction.

II

Three main features may be distinguished in Spinoza's doctrine of international relations. The first is the broad assertion that the mutual condition of states is that of the state of nature with all its implications. The second is the special emphasis laid upon one of the incidents of the state of nature, namely, upon the

¹ See, e. g. Pollock, *Spinoza, His Life and Philosophy*, 2nd ed. (1912), p. 292.

absence of any obligation to observe treaties. The third is the clear formulation of that set of ideas which is commonly given the name of reason of state : the notion that the state in its dealings with its neighbours is not bound by the canons of morality and good faith observed either between the individuals who compose it, or between itself as the Government and its own subjects.

The State of Nature. The necessity of preserving their existence and promoting their welfare forces men to abandon the state of nature and to establish, through the social contract, the reign of law in the form of a civil government. This, however, does not abolish the state of nature altogether ; it only shifts it to a higher plane, so to speak. For as in the state of nature the right of the individual is co-extensive with his power, so also is that of the civil government thus established. In fact it could not be otherwise considering that what really has taken place is that from the numerous individual units of the state of nature one huge unit of the state of nature has been created. "The right of the supreme government is nothing else than the right of nature, which is determined not by the power of each individual, but by that of the multitude, guided, as it were, by one mind ; that is as each individual in the state of nature, so likewise the body and mind of the commonwealth have just so much right as they have power."¹ States are now typical specimens of units living in the state of nature. Here, however, the analogy stops. There is apparently no need for those aggregates of men to unite in order to ward off dangers, to dispel fear and to co-operate for common purposes. Spinoza feels here that he ought to explain why that should be so, and he does it by pointing out that the state is able to guard itself from oppression by its neighbours, which men in the state of nature cannot do, weighed as they are daily by sleep, suffering from disease and old age, and liable to other natural troubles from which the state rests immune.² Having thus answered the most embarrassing question, he is not slow to draw the necessary conclusions. States being in the state of nature and retaining all rights of the state of nature, they are mutual enemies. Hence the unlimited right of war and conquest, accompanied if necessary by the total destruction of the settlements of the defeated adversary and by the transplantation of the inhabitants to the territory of the victor.³ "If," he says, "one state wishes to bring war on another state and resorts to extreme means to bring it under its jurisdiction, it can by right do so since it needs but the

¹ P. III, 2.² P. III, 11.³ P. VI, 35 ; IX, 13.

bare will of the commonwealth for war to be waged.”¹ This does not necessarily mean that there obtains a permanent condition of actual hostilities between nations. For they may conclude agreements which for a time constitute the basis of their mutual relations. But, again, however numerous and enduring, such compacts form in principle an exception to the natural state of enmity. And, as we shall see presently, they are of a highly precarious nature.

The Obligation of Treaties. The treaty, urges Spinoza, lasts so long as the cause which produced it. When this inducement disappears, there is a perfect right, vested in either contracting party to disengage itself from the obligation.² For in the state of nature it is clearly understood by both parties from the very beginning that fear of a threatened injury or hope of gain are the bases, and the sole bases, of contractual relations. In addition—and here we have what appears to be perhaps the first modern formulation of the *clausula rebus sic stantibus* in international law—“no one makes a contract for the future except on the hypothesis of certain preceding circumstances. But when these change, the reason underlying the whole position also changes; accordingly every contracting party retains the right to consult its own interests.” Curiously enough he found it advisable—quite unnecessarily from the point of view of the formal requirements of his method—to prove the compatibility of this principle with ethical and religious considerations. In the *Political Treatise* he appeals to reason and religion in support of the assertion that the obligation to keep promises is not an absolute one. Thus, he says, faith need not be kept with a thief who has entrusted stolen property to another man’s custody.³ In the *Tractatus Theologico-Politicus* he invoked *pietatem et religionem* in aid of the same contention. It would be nothing short of a crime if the ruler insisted on observing promises injurious to his subjects; he must not break faith with those who have entrusted their welfare to him. We are thus brought face to face with the third canon of his international doctrine, namely, with the principle known as

Reason of State. The state is not altogether without moral obligations. If it has none towards its neighbours, it certainly has distinct duties as regards the individuals who compose it, or rather as regards itself in the capacity of the guardian of the interests of those who have confided themselves to its care. There is indeed a law, which governs it to the exclusion of all other considerations :

¹ P. III, 11.

² T.P. XVI; P. III, 14.

³ P. III, 17.

the prosperity of its own government. *Imperii salus summa lex*. A state—says Spinoza—which expects its neighbours to abide by a treaty that has ceased to be advantageous, expects it to do a thing which is not only foolish, but also dishonest because involving a breach of the original and implied contract made with its own subjects.¹ This is a typical exposition of “reason of state,” a principle which, while affirming obligations of faith and duty in one sphere of action, deems it possible and necessary to exclude them from the other.²

III

It is of importance to note at this stage that in the same way as Spinoza’s political theory is deeply rooted in that of Hobbes, so also are his views on international relations. Hobbes’s real teaching on this subject is obscured by his occasional identification of the law of nations with the law of nature,³ a circumstance which led some publicists to regard him as a precursor of Pufendorf in the naturalistic affirmation of the law of nations. As a matter of fact, however, his law of nature as applied to states is not a law at all in the sense of a legal or moral precept. It is a right of nature, *jus naturale*, i. e. “the liberty each man hath to use his own power, as he will himself, for the preservation of his nature . . . and of doing anything which in his own judgement and reason he shall conceive to be the aptest means thereto.”⁴ The true meaning of this right of nature as applied to states is fittingly illustrated by what he understood to be the state of nature in which states are placed. It is a state of war. We remember the picturesque passage in the *Leviathan* in which he refers to the condition of states which “because of their independence, are in continual jealousies and in the state and posture of gladiators having their weapons pointed and their eyes fixed on one another, which is the posture of war.”⁵ The same trend of thought is given eloquent expression in several passages of the *De Cive*.

“The state of independent governments with respect to one another is a state of nature, that is of hostility. Nor, if they cease to fight, is it therefore to be called peace, but a breathing time ; in which each adversary, watching the motions and countenances of the other, judges his security, not from compacts, but from the force and councils of his adversary.”⁶

¹ P. III, 14.

² On this aspect of Spinoza’s teaching cf. Meinecke, *Die Idee der Staatsräson* (1924), pp. 270–80.

³ *Leviathan*, XXX.

⁴ *Ibid.*, XIV. This in contradistinction to what he calls the law of nature, *lex naturalis*, which is a binding precept of law and reason, but which he does not apply to relations between states. ⁵ *Leviathan*, XIII (in fine). ⁶ XIII, 7 ; see also X, 7.

'Not from compacts,' for covenants of mutual faith made in the state of nature are—with one solitary and truly Hobbesian exception¹—vain and invalid. There is no obligation of faith in relations between nations.²

On all these points Spinoza follows Hobbes very closely. The differences between them are mainly formal. To Hobbes, who was preoccupied, to the exclusion of all other considerations, with proving a very difficult thesis, the question of relations between states was one to be dealt with for the purpose of illustration and ingenious argument. To Spinoza it was an independent part of his system, and he dealt with it more fully. Secondly, Hobbes, for a very good reason of his own, conceived of the state of nature as of a truly horrible condition of incessant physical fear, if not of actual war—an urgent inducement to form a state under quite specific stipulations. Spinoza's conception of the state of nature prevailing between individuals, although similar in kind, differed from it in degree. The life of the individuals thus placed is indeed an "almost brutish" one, but their wretchedness is not one of wild terror, only, it seems, of impossibility of peaceful development for higher human purposes. This conception of the state of nature gave him thus the advantage of a less pessimistic and more constructive approach to the problem. The gulf between the state of nature as understood by him and an idea of a community of nations under the reign of law was not so wide as to convert the latter into a utopia unrelated to facts. However, before discussing the advance made by him on Hobbes, it is necessary to inquire in what do the shortcomings of his own teaching consist.

IV

Throughout his treatment of the problem under discussion, Spinoza is at pains to apply to relations of states the principles which stood so well the test in the case of individuals. One gains the impression that he is merely copying himself without taking the trouble of altering words. What, for instance, he says on the continued validity of treaties is nothing else than a well-nigh literal repetition of the views previously expressed on the binding force of contracts in the state of nature, including the hypothetical contract establishing the civil government.³ Examples of this kind could be multiplied at will. However, he breaks off the

¹ Promises extorted by fear are, according to him, binding, for otherwise "promises which reduced men to civil life . . . might likewise be of none effect" (*De Cive*, ch. II, 12, 16).

² *Ibid.*, II, 11.

³ Cf. *P.* II, 12, and the respective passage of *T.P.* XVI.

chain of analogy at the most vital point. In dealing with the individual man he was not content to limit himself to his conception of natural right as identical with *potentia*. There is another law, the law of reason, the rational principle of human welfare, which is altogether different from and frequently opposed to the right of nature. The latter, he says, prohibits nothing except what no one desires or no one can obtain, but it does not prohibit strife and hatred. But reason, human reason, whose supreme command is peace and by which nature as a whole is not bound—man is only “one atom” in the eternal order of creation—abhors them.¹ And yet it is this law of reason which is the dynamic and truly creative element in Spinoza’s political theory. Man must be compelled to live according to dictates of reason if he does not do so by his free will.² The principle of reason is the guiding motive of the two treaties. It is throughout a command of the conscious human will led by a conception of definite ends, and on its account Spinoza is not content to accept the state as it is, but searches after the *good* state. The man is free who lives, not according to the right of nature, but according to reason. And it is liberty achieved through obedience to reason which is the ultimate object of the state.³ However, all this is thrown to the winds when he comes to deal with relations between states. The law of reason retires to the background; the *jus naturae* asserts itself unfettered and undisturbed. Few statements are, in this connexion, more open to question than that which explains the unsatisfactory results of his international doctrine by the circumstance that he applied here the same principle as he did in his political theory.⁴ The very opposite is the case. A fatalistic determinism took here the place of his reliance upon the power of reason. Why should not the same motive which prompts men to live under the reign of law apply to whole nations? Are not the perils which beset them equally great? The function of the law, says Spinoza, is to protect the individual before his lower self. Are states less in need of such protection? Are collective passions less strong or less dangerous? And is not, with collective units, the teaching of experience less productive of results? There is no attempt on Spinoza’s part to deal with these matters in a manner worthy of the magnitude of the problem. The only approach to an explanation is contained in the paragraph, already mentioned, of the *Political Treatise* with which he opens his discussion of

¹ P. II, 8; T.P. XVI.

² P. XI, 3.

³ P. II, 11.

⁴ Vaughan, *Studies in the History of Political Philosophy* (1925), Vol. I, p. 82.

international relations. The state is self-sufficient ; it can defend itself from oppression whereas the individual labouring under physical disabilities and infirmities cannot. This reasoning is, of course, grossly naïve. The possible range of physical inequality—and that is what mainly matters in the state of nature—is incomparably greater between states than between individuals where intellectual superiority may counterbalance physical prowess. In the mere state of nature, no amount of foresight, good government, or sacrifice can save a small state from the clutches of a powerful neighbour should it wish to annihilate it. The inducement to leave the state of lawlessness is here, in the long run, not smaller than in the case of individuals.

No doubt, explanations might be forthcoming as to why Spinoza stopped short of what seems to be the natural consummation of his argument. The foremost of them would be the fact that the political condition of Europe in the seventeenth century was not such as to bring home to him the feasibility of a juridical organization of states, and that the signs of an order emerging with the Westphalian Treaty from the state of general disorder were still of a rudimentary and problematic nature. The fate of his own country at the time when he wrote the *Political Treatise* was to him a telling example of the remoteness of the *civitas maxima*. It is also possible that with him, as with Hobbes, the picture of nations living in an anarchical state of nature was resorted to for the purpose both of emphasizing the absolute character of state sovereignty—international law has frequently been used as a scapegoat in this manner—and of providing an illustration of the consequences involved in the dissolution of the bond of the civil state. But these explanations cannot do away with the fact that the master's hand lost its cunning when he set himself to deal with relations between states.¹ The breadth of vision of the pantheistic thinker who embraced the universe narrowed here down to the frontiers of a single state, and the principle of expediency which animates his political theory was jettisoned. The fault lay not in this principle, but in Spinoza's failure to extend it beyond the state. And it would be equally off the mark to maintain that his avowed business was to take things as they are and not as they ought to be. His avowed business was to draw conclusions from things as they are, and this he did to an excellent

¹ Suarez, *De Legibus ac Deo Legislatore*, wrote in 1612 on the necessary interdependence of states and on the consequent restriction of national sovereignty in a manner that would do honour to a most advanced modern believer in the League of Nations.

purpose in his political theory. He failed to do it in the field of international relations, and thus gave to a necessarily transient state of imperfection the character of finality.

Neither is it possible to regard his refusal to acknowledge the binding force of treaties as something other than a consistent application of the view that there is no law above or between states. It is difficult to follow those jurists and political writers who deem it necessary to emphasize their admiration for the great thinker by defending as inherently accurate this aspect of his doctrine.¹ They point out that neither law nor equity make it an unbreakable rule that promises should be kept at all costs. This is certainly true, but it is irrelevant so far as Spinoza's conception of the *clausula rebus sic stantibus* is concerned. For what he taught was that no compacts need be kept unless they continue to be advantageous. This is a proposition very different from the view that it is not always right or fair or permissible to exact the fulfilment of a contract. It is the very essence of the law of contract that it compels a party to fulfil the obligation also after it has ceased to be interested in the maintenance of the *vinculum juris*. To maintain, as does Spinoza, that the contract is valid so long as the will, prompted by the hope of gain, lasts, is to proclaim that the contract is not binding at all. It is a hopeless task to defend such a proposition as a rule of law or equity. Its author himself did not view it as such; it was to him one of the incidents of the law of nature, i. e. of the absence of law between nations. In fact, in so far as the application of the *clausula* is dependent upon the discretionary will of one of the parties, its essence is illegality, and such elements of right and justice as it may otherwise contain are necessarily ineffective. It has never been recognized as a rule of positive international law, although it may become so when resorted to by an authoritative judicial tribunal applying generally recognized principles of law and intent upon giving effect either to the will of the parties or to higher considerations of common international good. But this Spinoza did not think.

V

However disappointing may be the sudden turn which diverted a promising trend of Spinoza's argument to a passive recognition of a state of anarchy between nations, there are several elements in his teaching which lessen considerably the criticism directed against it.

¹ Sir Frederick Pollock in *Chronicon Spinozanum*, Vol. I (1921), p. 48; Vaughan, *op. cit.*, pp. 83, 84.

In the first instance, the fact—already referred to—should be noted that he travelled almost the whole distance on the road which he finally abandoned fascinated by the assumed self-sufficiency and majesty of the state. It is impossible to read and to understand the crucial paragraphs of the third chapter of the *Political Treatise* without being struck by the almost pathetic vacillation between the purely Hobbesian conception of international relations and the idea of a comprehensive federation of states as the most efficacious means of securing peace. This in fact is a significant advance made in the *Political Treatise*, written at the close of his days, upon the *Tractatus Theologico-Politicus*. We see here repeated attempts on his part to avail himself of the same fruitful line of thought which was of decisive merit in his plea for the establishment of civil society. The natural right of man, he says, so long as its realization rests upon the individual in the natural state of isolation, is of a mere conceptual character. It consists *magis opinione quam re*. Only through combination of powers, otherwise rendered nugatory by fear, can the natural right be realized.¹ “If two come together and unite their strength, they have jointly more power, and consequently more right, over nature than both of them separately, and the more there are that have so joined in an alliance, the more right they all collectively possess.”² He applies exactly the same principle to states: “We cannot at all doubt that if two states are willing to offer each other mutual help, both together are more powerful, and therefore have more right than either alone.”³ Fear being the great destroyer of might and right, “the more commonwealths there are which have contracted a joint treaty of peace, the less each of them is an object of fear to the remainder.”⁴ We feel that he has traversed the whole road, and that what was left was to draw the conclusion which he had just drawn in the analogous case of individuals. Instead, doubts of an altogether different order rise to obscure the argument and to shift the issue. Such an alliance, he says, makes the state less *sui juris* because more dependent on others for the preservation of its rights; it diminishes its faculty to go to war; it binds it to observe the conditions of peace and to submit itself to the joint will of the confederates. Unfortunately he leaves us quite in the dark as to his final opinion on the subject. Are these restrictions of national sovereignty following upon comprehensive treaties of alliance such as to render their conclusion dangerous or undesirable? Or are these drawbacks merged

¹ P. II, 18.² P. II, 13.³ P. III, 12.⁴ P. III, 16.

in the higher advantage accruing from such additional security? He is non-committal and refrains from stating that this dependence is only provisional and, according to his own argument, the fundamental condition of the realization of a right more valuable. And it seems that he is unwilling to say it, considering that the insistence on the precarious nature of treaties of alliance thus concluded dominates the whole argument. But it is apparent at the same time that he is wrestling to find a new approach to the problem.

These considerations suggest also that it would be a mistake to identify his general attitude with one of glorification of war. The necessity of peace is the starting-point and the regulative principle of his political system *pro foro interno*; to it he is occasionally prepared to sacrifice the ultimate aim of the civil society, namely, the liberty of the subject. It would be strange if the internal peace thus secured were to be frustrated by continuous war coming from outside. In fact, Spinoza is constantly in search of safeguards against the dangers of war. A democratic form of government is one remedy;¹ the abolition of paid armies another.² And we find in the *Political Treatise* a detailed plan designed to enhance the chances of peace in an aristocratically governed community. He proposes that the senators be awarded a hundredth or a fiftieth part of the total value of the imports and exports as an inducement to preserve peace and not to protract war. For the foreign trade during war being reduced to a minimum, the senators will naturally feel inclined to diminish the evils of war. The possible objection that such a tax would constitute too great a burden upon the citizen, Spinoza meets with the argument that "peace cannot be bought at too great a price."³

This pronounced affirmation of the necessity of peace seems also to suggest that, however strongly worded his conception of the *clausula* may have been in theory, his view on the relations between states was not one of governments breaking their engagements at the slightest provocation. For if, by hypothesis, the state of war is the only alternative to a condition regulated by treaty, it is not to be supposed that indiscriminate violation of treaties was regarded by him as a normal course of action. In addition, the passages in the two treatises, in which he sets forth his views on the question of the binding force of treaties convey the impression that the treaties to which he refers are political

¹ P. VI, 10, 31; VII, 12, 17, 22, 28.

² T.P. XVIII; P. VII, 5.

³ P. VIII, 31. See also P. VII, 7.

conventions in the strict meaning of the word, namely, treaties of peace and alliance. There is as a matter of strict law no reason for making distinctions between this type of convention and others. Nevertheless their position has ever since been regarded as a peculiar one, and many writers who put the rule *pacta sunt servanda* in the foreground of international law think it necessary to make an exception in point of alliances.¹ Thus, if it is alliances which he had in mind, then, except for the poignancy of the statement, there is not much to choose between him and no less a person than Grotius.² Moreover, quite apart from treaties of alliance, the father of international law himself gave to the *clausula* a blessing more hesitating in form than in substance. (It is of interest to note here the similarity of instances quoted in this connexion by Grotius and Spinoza. Both refer to deposits which need not in certain circumstances be returned.³ This similarity may be accidental, but if it is not, it throws some light on the controverted question of Spinoza's acquaintance with the writings of Grotius.⁴)

VI

It was inevitable that Spinoza's influence should rest, not on the hesitating undercurrent which we have been tracing, but on the apparent content of his teaching. Accordingly he was more than once drawn upon by those who either denied international law, or attempted to introduce into it disintegrating elements in the form of a vague and comprehensive *clausula rebus sic stantibus* or of reason of state. Pufendorf may be referred to here as an instructive instance. Stripped of its contradictions and of its meaningless appeals to generosity, Pufendorf's statement on the binding force of treaties strikingly resembles that of Spinoza. He does not expressly mention him in this connexion, although he criticizes elsewhere his political doctrine in scathing terms.⁵ The main points of his discussion of the subject are the same as those dealt with by Spinoza. There is the same insistence upon the obligation ceasing to be binding if found inconsistent with the interests of the state, and upon the precedence of the sovereign's duty to his subjects to whom he is bound by the original promise

¹ See e. g. Lammasch, *Das Völkerrecht nach dem Kriege* (1917), pp. 159-71.

² L. II, c. xxv. 4. He maintains here *inter alia* that an ally is not bound to render assistance if the common effort is not likely to be crowned with success. See also L. II, c. xvi. 27 (1).

³ L. II, c. xxvi. § 25 (2); P. III, 17.

⁴ Cf. here Sir Frederick Pollock in *Chronicon Spinozanum*, Vol. I (1921), pp. 47, 48.

⁵ *De Jure Naturae et Gentium* (1672), L. II, c. ii, § 3; L. III, c. iv, § 4.

embodied in the social contract. Like Spinoza he points out that a limitation of this kind is implied in every promise of aid and assistance, and that an ally who puts his faith in a treaty which is not equally advantageous to the other contracting party is a fool and has to blame himself for his improvidence.¹ The trend of reasoning and the very terms employed in this connexion by Pufendorf and Spinoza are so similar that the latter's direct influence does not appear to be a matter of pure conjecture.²

It is probable that the general influence exercised in this respect by Spinoza was that of having imparted to some of the doctrines of Machiavelli the authority and detachment of an imposing philosophical system. The development of certain political doctrines in Germany in the first half of the nineteenth century provides a good example of this process. The student of the history of reason of state and of its bearing on the science of international law will notice, not without interest, that men like Herder, Fichte, and Hegel were admirers both of Spinoza and Machiavelli. This may be a coincidence, but it is highly probable that it is not. They all saw in the Italian writer, not the great challenger of morality in the domain of man's collective action, but the patriot offering to a prince of divided Italy wise counsels how to save the fatherland. In contemporaneous Germany they saw a sad analogy to the state of Italy in Machiavelli's time, and longed for men and principles able to promote their country's

¹ *Op. cit.*, L. VIII, c. vi, § 14; c. ix, § 5.

² That, on the other hand, Spinoza's parallel line of reasoning envisaging a comprehensive confederation of states might not have passed altogether unnoticed, is rendered probable by the study of those writings of Kant and Rousseau in which they deal with international law and the problem of eternal peace. Kant does not refer here directly to Spinoza. Yet it is sufficient to compare the relevant chapter in the *Metaphysical Principles of the Science in Law* (1797, para. 54)—it is entitled "The Elements of International Law"—in order to note how both deal in the same manner with the same questions. Kant, like Spinoza, emphasizes that states are by nature in a non-judicial condition; that this condition is a state of war in which the right of the stronger prevails; that an alliance is an adequate means for mutual protection, and that the federation thus created is revocable on any occasion. There is one fundamental difference between them, inasmuch as Kant took the step which Spinoza shrank from taking. This natural position of potential war, says Kant, is wrong in itself in the highest degree, and states are mutually under the obligation to pass out of it. It will also be observed that Kant too attaches considerable importance to the abolition of standing armies and to republican form of government as guarantees of peace.

Rousseau, *A lasting Peace through the Federation of Europe* (1756), and his plan of a confederation are obviously based on the proposals of Abbé de Saint-Pierre, but those passages of the essay (see p. 47 of Vaughan's translation of 1915) in which he speaks of the natural state of war between nations, of treaties constituting only a provisional truce and changing with the change of circumstances, again bring to mind the corresponding passages of the *Political Treatise*.

liberation from the yoke of the oppressor and from internal dissension. However, an abnormal political situation would have been hardly sufficient to secure general acceptance for doctrines which even Frederick II deemed it necessary to refute page by page and sentence by sentence. It was necessary to show that the Machiavellian teaching was not a bundle of cynical statements and ingenious devices concocted in order to ensure success in doubtful enterprises, but one of the consequences of an organic theory of state. The probability that it was Spinoza's teaching that did much to lift the odium resting on Machiavelli cannot be lightly dismissed.

Of all these writers—perhaps of *all* political and philosophical writers—Hegel's influence on the theory of international law is by far the profoundest and the most clearly demonstrable. Bodin's theory of sovereignty had left unimpaired the state's subjection to the higher rule of the law of nature and nations. Hobbes's teaching on international relations remained on the whole without influence, and so far as it was noticed it was effectively dealt with in the numerous "refutations of Mr. Hobbes."¹ But Hegel's theory of sovereignty and of the supremacy of state has become for many publicists the starting-point for their exposition of international law. It is therefore not without significance that Hegel was within the circle of men to whom Spinoza was all but unknown. That he was conversant with Spinoza's writings is amply confirmed both by his enthusiastic acknowledgement of Spinoza's place in philosophy, and by his casual disparagement of his doctrine. The differences between the political systems of Spinoza and Hegel are no doubt profound, but they are not productive of any such practical consequences as is the idea which is common to both, namely, the identification of right and power as the basis of the state.² Hegel's saying, "the real is the rational, and the rational the real," is only another formulation of Spinoza's conception of the *jus naturale*. In no part of Hegel's writings is this affinity of views more striking than where he deals with relations between states. Consider, for instance, the well-known passage in his *Philosophy of Right* which bears the title "International

¹ Cf. here especially Cumberland's *A Treatise on the Law of Nature* (1672); Maxwell's translation appeared in 1727, where in para. 54 and 55 of Chapter V, after an exhaustive analysis, the international doctrines of Hobbes are described as conducive to "the greatest inconvenience of mankind," as contrary to experience and altogether monstrous.

² Cf. here Heller, *Hegel und der nationale Machtstaatsgedanke in Deutschland* (1921), pp. 54-67.

Law." Freed of their cumbersome language, they read like a paraphrased version of the corresponding passages of the *Tractatus Politicus*. We find here the same conception of states as being in the state of nature; the same statement—after lip-service has duly been paid to the proposition that the rule *pacta sunt servanda* is the basis of international law—that, states not acknowledging a superior power over them, the obligation to observe treaties is a purely formal one, adapting itself to the changed circumstances and resulting, if need be, in the total voidance of the treaty;¹ and, finally, the opinion that, in default of an agreement of the particular wills of the interested states, a dispute between them can be settled by war only.²

Hegel was following in this respect the lead given by Fichte, the man who first attempted the task of incorporating the idea of *Machtstaat* in the working moral order of the universe, and who in his essay entitled "Machiavelli as a Writer" has done much to complete the task, begun by Herder, of vindicating Machiavelli in Germany. Here again the decisive argument bears a striking resemblance to the third chapter of the *Political Treatise*. At the same time the fact must be borne in mind that Fichte also belonged to the group of men with whom Spinoza's influence gradually superseded that of Kant. It is, of course, difficult, in the absence of direct reference to Spinoza's political writings,³ to claim for this and similar instances of his influence a degree of cogency which is not warranted by irrebuttable evidence. But it is submitted that as a result of a comparison between the corresponding passages—a task which reasons of space do not allow me to attempt here—the element of doubt is considerably reduced. This may be also said of Rosin's scholarly and guarded essay⁴ on Spinoza's influence over Bismarck, the man whose recourse to Machiavelli's methods in the welding of a great Empire left a visible impress upon the development of international relations during the fifty years preceding the World War. But the influence of the conception of international relations and sovereignty as propounded by Fichte and Hegel was not restricted to Germany, although it found there ready acceptance. Its spirit underlies to

¹ § 333.

² § 339.

³ Such direct reference to Spinoza will be found in the well-known monograph of Lasson, *Prinzip und Zukunft des Völkerrechts* (1871), pp. 152, 153. He was a convinced denier of international law. See also Menzel in *Schmoller's Jahrbuch*, XXXI (2) (1907), pp. 45 *et seq.*, on Spinoza's influence on Seydel and other prominent German jurists whose attitude towards international law was a negative one.

⁴ *Bismarck und Spinoza in Festschrift für Otto Gierke* (1911), pp. 383–420.

a large extent the international law of the nineteenth and twentieth centuries. Spinoza's indirect part in this development does not, in the light of the preceding observations, appear to be altogether negligible. This is well illustrated by the manner in which Bernard Bosanquet, one of the leading exponents of English idealistic philosophy, who in his *Philosophical Theory of the State*¹ voiced with almost convincing eloquence the Hegelian principle of the absence of law between states, reminded his readers that this Machiavellian principle has in its support the great authority of Spinoza.

VII

It is not necessary to summarize here in the usual manner the conclusions reached in the preceding sections of this article. Only one fact should, it is believed, be specially referred to; a fact which explains why Spinoza, of all men,² should have lent himself to preaching the doctrine of lawlessness in the relations of states. The inclinations of his personal life; the importance he attached to the necessity of securing peace as the primary task of governments; the spirit of formal unity which pervades his work—all these factors pointed to a different solution. The explanation, as we have seen, is that he failed to apply to international relations the principles of the method of which he and Hobbes were the precursors, if not the founders, and which under the influence of men like Bentham on the one hand, and of the historical school on the other, gained in the nineteenth century general recognition. It is the method of dealing with human relationships on a rational basis and by means of inductive inquiry. This does not mean that the science of man thus conceived abdicates the function of consciously promoting social ends, or that man is to it no more than a lifeless object of nature. It means only that it is content to be judged by the standards of scientific method; that it is intolerant of contradictions within the systematic exposition of the subject; that it avoids unnecessary fictions and personifications. From a variety of reasons this manner of treatment has so far been only imperfectly applied to that aspect of social life which is embraced by relations of independent states. The theory of

¹ 3rd ed. (1920), Preface, p. xiv. Similar is the attitude of Duff, *Spinoza's Political and Ethical Philosophy* (1903), pp. 457-61.

² Hallam, *Introduction to the Literature of Europe*, fifth ed. (1885), vol. IV, ch. iv, § 76, who expresses indignant disapproval of Spinoza's international doctrine, refers to him as a virtuous and benevolent man, and comments on the slight connexion between theoretical principles and personal conduct.

international law still operates with the conception of a plurality of states of which every one is the highest ; with the idea of rights not grounded in an objectively binding rule of law ; with the doctrine of duties addressed, not to human beings, but to impersonal, although personified, states ; with the assumption that states are self-sufficient. It is now generally admitted that these and similar notions are unable to bear the test of a critical examination from the point of view of either juridical logic, or economic facts or cultural needs. And yet they are firmly embedded in the theory of international law, and influence constantly the actions of governments. It is therefore not merely of historical interest to investigate how far this state of affairs is a heritage from writers like Hobbes and Spinoza, who, while laying the foundations for the scientific study of human society, refrained from applying it to international relations. In the present article an attempt has been made to show how this elimination of the inductive method and of the principle of expediency worked in Spinoza's mind, and how it was unsuccessfully opposed by a more constructive line of thought.

CRIMINAL JURISDICTION OVER FOREIGNERS

The *Franconia* and the *Lotus*.

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ON August 2, 1926, a French vessel, the s.s. *Lotus*, of the Messageries Maritimes, collided with and sank on the high seas a Turkish vessel, the *Boz-Kourt*, causing loss of life amongst the persons on board the Turkish vessel. On the arrival of the *Lotus* at Constantinople, which was her next port of call, Lieutenant Desmons, a French citizen and the officer on the bridge at the time of the collision, was arrested and imprisoned by the orders of the Turkish Government on a charge of homicide by negligence (viz. in English law, manslaughter), under Article 6 of the Turkish Penal Code which gives the Turkish courts jurisdiction, on the request of the injured parties, to entertain proceedings in respect of offences committed by foreigners even if they are committed abroad, when they are committed against Turkish nationals,¹ and he and the captain of the *Boz-Kourt* were brought before a criminal court of Stamboul. The court rejected the objections made on behalf of Lieutenant Desmons that the court had no jurisdiction.

The matter formed the subject of negotiations between Turkey and France, the latter maintaining that the Turkish courts had no jurisdiction over this matter by international law, and on the proposal of the Turkish Government an agreement was come to in September, 1926, between the two Governments for the submission of the affair to the Permanent Court of International

¹ Art. 6.—L'étranger qui, hors des cas prévus par l'article 4, commet à l'étranger, au préjudice de la Turquie ou d'un Turc, un délit pour lequel la loi turque prononce une peine restrictive de la liberté d'au moins trois années, est puni d'après le code pénal turc, pourvu qu'il soit arrêté en Turquie. Mais la peine est diminuée d'un tiers et au lieu de la peine de mort, on applique vingt ans de prison lourde.

"Toutefois, dans ce cas, les poursuites n'ont lieu qu'à la requête du ministre de la justice ou sur la plainte de la partie lésée.

"Si le délit a été commis au préjudice d'un autre étranger, le coupable est puni, à la requête du ministre de la justice, suivant les dispositions édictées au premier alinéa du présent article, pourvu toutefois :

"1^o Qu'il s'agisse d'un fait pour lequel la loi turque prononce une peine restrictive de la liberté, dont le minimum ne soit pas inférieur à trois ans :

"2^o Qu'il n'existe pas de traité d'extradition ou que l'extradition n'ait été accepté ni par le gouvernement du lieu dans lequel l'inculpé a commis le délit, ni par le gouvernement de sa patrie."

Justice by special agreement under Article 40 of the Statute of the Court. Lieutenant Desmons, who had been detained in prison, was then released on bail, but the trial was continued and the Turkish captain and Lieutenant Desmons were both sentenced to $2\frac{1}{2}$ months' imprisonment for homicide through negligence. Against this sentence both accused appealed to the court of appeal of Eskir Chéhir, but the appeals have not yet been heard.

Under the terms of the special agreement (*compromis*), which was finally signed by the French and Turkish representatives at Geneva on October 12, the questions referred to the Court are as follows :

" 1. Has Turkey, contrary to Article 15¹ of the Convention of Lausanne of July 24th, 1923, respecting conditions of residence and business and jurisdiction, acted in conflict with the principles of international law—and if so, what principles—by instituting, following the collision which occurred on August 2nd, 1926, on the high seas between the French steamer *Lotus* and the Turkish steamer *Boz-Kourt* and upon the arrival of the French steamer at Constantinople—as well as against the Captain of the Turkish steamship—joint criminal proceedings in pursuance of Turkish law against M. Desmons, officer of the watch on board the *Lotus* at the time of the collision, in consequence of the loss of the *Boz-Kourt* having involved the death of eight Turkish sailors and passengers ?

" 2. Should the reply be in the affirmative, what pecuniary reparation is due to M. Desmons, provided, according to the principles of international law, reparation should be made in similar cases ? "

No one interested in international law can fail to look forward to the judgment of the Permanent Court in the *Lotus* case with the keenest interest. It is perhaps the first case which has come before the Court in which the question for decision is a point of general international law. The exercise of criminal jurisdiction over foreigners is a sphere in which juridical literature and speculation abound and are conflicting even in the matter of first principles, but international precedent is rare and indecisive. Whatever the result of the case may be, the judgment can hardly avoid being something of an event in the development of international law.

When the Permanent Court is shortly expected to make a pronouncement, which will be invested with so much authority, it is a dangerous time for a writer to air his own theories, and one, who has already been so temerarious as to set them out in print, may be well advised to maintain a discreet silence, ready (as the event shall dictate) to proclaim his triumph or explain his reverse.

¹ Article 15 of the Residence Convention attached to the Treaty of Lausanne provides : " Subject to the provisions of Article 16, all questions of jurisdiction shall, as between Turkey and the other Contracting Powers, be decided in accordance with the principles of international law."

It is not the purpose of this article to put forward new theories or even to call attention to theories already advanced, though it will not be possible to avoid some reference to the latter. It happens, however, that a point which may well form the crux of the question to be decided by the Permanent Court in the *Lotus* case was considered by fourteen English judges in the Court of Crown Cases Reserved in 1876 in one of the most famous cases in the English Law Reports—the case of *Regina v. Keyn* (L.R. 2 Ex. D. 63)—more commonly known, perhaps, as the case of the *Franconia*. In these circumstances an appreciation of the reasoning contained in the judgment delivered in that case would not appear to be ill timed. Some explanation is, however, necessary in order that the similarity of the questions arising in the two cases may be made clear.

In an article by the present writer in an earlier number of the *Year Book* on the subject of “Criminal Jurisdiction over Foreigners”¹ the various grounds which are cited in support of the assumption of criminal jurisdiction in various circumstances under different legal systems were discussed. Amongst such grounds there is one which has been put forward that injury to its own nationals will justify a state exercising criminal jurisdiction over a foreigner in respect of acts committed anywhere (sometimes called “the passive national theory of jurisdiction”). Such a claim to jurisdiction is in fact made in Article 6, paragraphs 1 and 2, of the Turkish Penal Code. It is quite clear that, if such a ground for jurisdiction is recognized by international law, it covers the *Lotus* case by reason of the injuries to Turkish nationals resulting from the collision. If the Permanent Court should adopt this ground as the basis of their decision, then indeed it will be unnecessary for them to consider the question which was considered by the English judges in the *Franconia* case, but such a doctrine is not part of English law and the English judges could not consider it.² This would also be the case if the Court adopted what is sometimes known as the universal theory of jurisdiction, according to which the sole requirement for jurisdiction is the presence of the accused at any time in a state’s territory, a claim which with certain restrictions is made in the 3rd, 4th, and 5th paragraphs of Article 6 of the Turkish Penal Code. But, as

¹ *British Year Book of International Law*, 1925, pp. 44–60.

² Amphlett, J.A., in *R. v. Keyn*, 2 Ex. Div. at p. 117, states as an established and undisputed proposition that “a foreigner committing an offence of any kind, even against an Englishman, on foreign territory cannot be tried for it in an English Court”

explained in my previous article, neither of these two doctrines has up to the present been widely adopted ; the latter by four countries only—the Argentine, Austria, Hungary, and Italy—and the former by six countries : Brazil, Greece, Italy, Mexico, Norway, and Sweden. Turkey must now be added to both these lists.

There is, on the other hand, one ground for the exercise of jurisdiction which is universally admitted (namely, the territorial theory of jurisdiction) and the Court may prefer to rest their judgment upon it if it can be made to cover the case,¹ without going to the length of deciding whether Article 6 of the Turkish Penal Code is as a whole consistent with international law. It is generally recognized that a state may exercise criminal jurisdiction over foreigners in respect of offences committed within its territory. The expression “ committed within its territory ” used loosely may, however, cover two entirely different classes of cases :

(a) where a man physically present inside the territory commits an act which is an offence ;

(b) where a man, while remaining himself outside the territory, commits an act which takes effect within the territory and is an offence there (viz. fires a gun over the frontier, sends swindling letters by post, acts by agents, &c., &c.). John Bassett Moore described these two classes of cases by the names of “ subjective ” and “ objective ” territorial jurisdiction respectively. It was one of the conclusions of my previous article that both subjective and objective territorial jurisdiction are comprised within the territorial theory as alternatives, and that each of them is a ground of jurisdiction recognized in fact in the legal systems of all states and consequently recognized by the law of nations.² It is not

¹ In my previous article the conclusion was reached that in the matter of the exercise of criminal jurisdiction over foreigners the onus must rest upon the state exercising it to show that it was justified under some principle, which was part of international law and had therefore received the common assent of nations, rather than upon the foreigner's state which complained to show that its exercise in the given case was forbidden by some generally recognized principle of international law, or in other words that the presumption is against rather than in favour of jurisdiction. If the Court should be of the same opinion it is hardly possible that they could admit either the “ passive national theory ” or the “ universal theory ”, and it would follow that the exercise of jurisdiction by Turkey in the *Lotus* case must be justified under the territorial theory if it could be justified at all.

² The possibility that *both* grounds are required *concurrently* or some combination of both must not be left out of consideration, i.e. that in the case of a foreigner both his presence in the territory and the occurrence within the territory of a complete offence (something which disturbs the public order in the territory) are required to create jurisdiction. If it were so there would be many crimes which no state would have jurisdiction to try at all and it is thought that there is the strongest ground for saying that this is not international law.

material to the present purpose to recapitulate the arguments or authorities¹ for this conclusion, on which the judgment of the Court may throw some light. But it will be necessary to consider it somewhat further as a proposition of English law, so far as the objective territorial jurisdiction is concerned.² It is obvious, however, that the objective territorial theory must, if it is admitted as a valid theory, give rise to many nice questions most suitable for judicial exposition as to the circumstances in which an act can be said to be committed within the jurisdiction, when the actor remains outside. No better instance, perhaps, could be found than that presented by the *Lotus* case.

A private ship on the high seas is under the jurisdiction of the state whose flag she flies and it would not be disputed that all offences committed on board her are, for the purposes of the application of the territorial theory, committed on that state's territory. If then a foreign ship collides with her through the criminal negligence of the latter's navigating officer, who so steers his ship as to make a hole in her which causes loss of life on board, can that act of criminal negligence of the foreign officer be said to be committed on the ship which is injured? Is such a case covered by the objective territorial theory? This is the point which it is thought may be an important one in the *Lotus* case, and it was this point which was considered by the English judges in the case of the *Franconia*.

The facts of the *Franconia* case were as follows. The *Franconia*, a German vessel, was on a voyage from Hamburg to the West Indies under the command of Keyn, a German subject. When being navigated by Keyn she collided with and sank the *Strathclyde*, a British ship, in the Straits of Dover at a point $1\frac{9}{10}$ miles from Dover pier head and $2\frac{1}{2}$ miles from Dover beach. Jessie Young, a British subject and a passenger on the *Strathclyde*, which was on a voyage from London to Bombay, was drowned. Keyn was arrested and put on his trial at the Central Criminal Court for the manslaughter of Jessie Young by criminal negligence

¹ For the United States, see *Ford et al. v. United States*, Supreme Court on April 11, 1927, on the question of objective territorial jurisdiction. For France, see Travers, *Le Droit Pénal International*, Vol. I, p. 134.

² At the time of the appearance of my previous article the passage in the judgment of Cockburn C.J. in *R. v. Keyn* which is quoted below had escaped the attention of the writer. In view of this passage, the conclusions of that article are perhaps, so far as English law and the objective territorial jurisdiction are concerned, too categorically stated. Nevertheless, for the reasons given in the text and foot-notes hereafter, the writer is still of the opinion that those conclusions are justified, i.e. even so far as English law is concerned.

in the navigation of his ship, and the jury found him "guilty." It was argued on behalf of Keyn that the court had no jurisdiction in respect of an act committed in the circumstances above described. This question of law was reserved by the judge (Pollock B.) for the Court of Crown Cases Reserved, where it was twice argued, by Benjamin, Q.C. and Cohen, Q.C. and other counsel for the prisoner, and by Sir H. Giffard, Solicitor-General (afterwards Lord Halsbury), and other counsel for the prosecution, who contended that there was jurisdiction. On the first occasion (May 6 and 13, 1876) it was argued before six judges, and the court, being divided in opinion, ordered that the question should be re-argued. This was done on six days in June, 1876, before fourteen judges, and judgment was delivered in the following November.

It is perfectly true that the *Franconia* case differed from the *Lotus* case in a most important fact, namely, that the collision there occurred in territorial waters, i.e. within the maritime belt.

Counsel for the prosecution, however, put forward two alternative grounds in support of jurisdiction :

(a) that the act was committed in territorial waters and the court had jurisdiction over all offences committed in territorial waters ;

(b) that the prisoner's ship, having run into a British ship and so caused the death of a passenger on board the latter ship, the offence was committed on a British ship and therefore the court had jurisdiction.

The former ground has no direct bearing on the *Lotus* case. It was regarded as the more important point involved in the case and received the largest amount of attention in the judgments delivered : and it is in connexion with this point that the case has always been principally remembered and quoted. It is sufficient to recall here that the court by a majority of seven judges to six (one judge, Archibald J., died after the argument but before judgment was delivered) rejected the first contention of the prosecution. The actual ground for the decision of the majority of the court on this point was simply that the English courts had not either by English common law or by statute been given criminal jurisdiction over matters occurring on the seas within three miles from low water mark. This decision in 1876 was followed in 1878 by an Act of Parliament, the *Territorial Waters Jurisdiction Act*, expressly for the future conferring such jurisdiction. The judgments delivered, occupying no less than 176 pages in the Law Reports, are indeed a mine of learning on the nature and extent

of a state's dominion over the seas, the width of the belt of territorial waters and the nature of a state's rights in and over those waters in international law, but all this, so far as it deals with considerations specially appertaining to territorial waters, is irrelevant to our present purpose.

The second contention of the prosecution, however, was quite independent of the three-mile zone and, if valid, would justify the conviction of a prisoner for an offence committed in the middle of the ocean. It involved precisely the point which has been described above of the validity and the application of the theory of objective territorial jurisdiction. Therefore the part of the case which must be considered here are the observations of the judges on this second contention. Their opinions were divided upon this as upon the other part of the case. Two questions are really involved:

1. Is the objective territorial doctrine recognized in English law? In other words, does English law claim criminal jurisdiction over foreigners in respect of acts committed by them in England when they themselves were out of England?

2. Assuming the answer to the first question to be in the affirmative, is the negligent navigation of a foreign officer on a foreign vessel, which causes his vessel to ram and sink a British ship, an act committed on the British ship?

When the judgments delivered are considered, it will be found that these two questions are dealt with in the reverse order.

Now it was necessary for those members of the court in the *Franconia* case, who held that the court had no jurisdiction over Keyn, to reject *both* the contentions of the Crown. On the other hand the minority of the judges, who held in favour of jurisdiction, could support their judgments on either ground. Of the six judges in the minority Grove J. does not deal with the second contention of the Crown at all, being content to decide the case on the first part of the case only. In addition to the seven judges who were the majority rejecting jurisdiction on both grounds, Brett and Amphlett, JJ.A., rejected the second contention of the Crown, while supporting jurisdiction on the first point, bringing the majority up to nine on the second point. Denman J. was strongly in favour of the Crown on the second point, making it the principal ground of his decision in favour of jurisdiction. He was supported by Coleridge C.J., who, however, admitted that he had some doubt on this point,¹ and, though with much more grave doubt, by

¹ 2 Ex. Div. at p. 158. "I am of the same opinion, though with some doubt, upon the second (ground), i. e., that the offence was committed on board an English ship. If

Lindley J.¹ The majority therefore on this part of the case is nine to three. It will be seen, however, that the majority of nine judges do not all come to the same conclusions on the two points involved in this part of the case, which to some extent reduces the majority.

We will summarize successively the judgments of the two protagonists on either side—Denman J. in favour of and Cockburn C.J. against jurisdiction.

Denman J.'s opinion may with the qualifications already stated be taken as that also of Coleridge C.J. and Lindley J. Denman J. begins² by stating that, if the offence was committed on the British ship on the high seas, it is clear that the court has jurisdiction, although the offence was committed by a foreigner, unless the foreigner is exempt by reason of the fact that he was on board a foreign ship himself, while committing the offence on board a British ship. He thus recognizes the existence of the two points which we have mentioned above :

(a) Was the offence committed on the British ship ?

(b) If so, does this fact give the court jurisdiction over a foreigner, seeing that he himself was not on the British ship ?

Dealing with (a) first, he says :

“ It is argued that the offence was not committed on board a British ship, because the offence of manslaughter is of a complex character, consisting of an act of negligence, and of death the result of that negligence ; and that inasmuch as in the present case the act of negligence was completed on board the German ship and there ended, the offence, at all events as to one material ingredient of it, was there committed, and so there was no jurisdiction to try a foreigner as for an offence committed on board a British ship and so on British territory. In support of this view is cited the case of *Lacy*.”

this had been murder it would, as I understand the law, be clear that the offence was so committed. I need cite no further authority than the case of *Reg. v. Armstrong* (13 Cox Cr. Cases 184), decided in 1875 by my lamented brother Archibald. I think I follow, and I am sure I feel the weight of, the reasoning which has brought the Lord Chief Justice to the opposite conclusion on this point. But on the whole, though not without some hesitation, I concur in the reasoning of my brother Denman, and I think the same rule should apply in manslaughter which applies in murder. And on the second point, therefore, I am of opinion that the conviction was right and should be affirmed.”

¹ 2 Ex. Div. pp. 98–9. “ In the view thus taken it becomes unnecessary to consider whether the conviction can be supported on the ground that the offence of the prisoner was committed on board the *Strathclyde*, and not on board the *Franconia*. The case of the *United States v. Davis* is an authority in support of the conviction on this ground also, but I am not satisfied on this point ; I prefer to rest my judgment upon the broader ground that the waters around the coasts of England are under the protection of English law, and that all persons, whether English or foreign, who recklessly navigate those waters and thereby cause others to lose their lives, are punishable by the criminal law of this country.”

² 2 Ex. Div. at pp. 101–8.

The judge then proceeds to deal with and distinguish the case of *Lacy* (cited in *Bingham's Case*, 2 Co. Rep. 93 (a)). Some explanation is necessary to understand this part of the argument. The English cases cited on the question as to where an act is committed in complex situations are cases dealing not with the question of the extent of the jurisdiction of the British Crown but with *venue* in cases where the Crown had certainly jurisdiction. It was an old principle of English law (now abolished by statute) that a man could only be tried by a body of jurymen chosen from the county in which the alleged offence had been committed and, in order that jurisdiction should exist, the whole of an offence must be held to be committed in the county (or *venue*) in which he was being tried. The offence of murder consists for instance of an act (say a blow) followed by death, and in order that jurisdiction should exist it was necessary that both the blow and the death should take place in one county. Where the blow and the death took place in different counties there was no jurisdiction in either. This difficulty had been got over in the case of crimes committed in two counties as early as Coke's time by allowing the murder or manslaughter to have been committed at the place where the death took place but not where the stroke was given (see Coke Inst. 2. 318). The same principle had, however, been applied in cases within the jurisdiction of the admiral. Where therefore the blow was given on the seas and the death took place within a county, it was held that neither the admiral nor the judges who try offences committed in a county had jurisdiction, no complete offence being committed in either jurisdiction. This is *Lacy's Case*, and as between the admiral and the courts of common law it required a statute to deal with the point. But, argued Denman J., that is not a relevant case, because both the act (or the blow) and death took place in the same jurisdiction, i. e. on the British ship on the high seas, and in support of his contention that the act must be regarded as committed on the British ship he cites another case dealing with *venue*, the case of *R. v. Coombes* (1 Leach Crown Cases 388) in the following words : ¹

" I think this objection is completely answered by the case which was cited by the Solicitor General, *Combes' Case*, stated in East's P.C. p. 367, as follows :

' Where one standing on the shore shot another standing in the sea who afterwards died on board a ship, all the judges held that the trial must be in the Admiralty Court, and not at common law.'

¹ These technical rules about *venue* and jurisdiction naturally led to difficulties and cases where a guilty man might escape, for the reason that his crime was not completed.

"The report in Leach shews that the case was one of murder. The deceased was a sailor on board a boat which had run aground on a sand-bank about 100 yards from the shore ; and the prisoner, a smuggler, being on the shore firing at other sailors who were endeavouring to push off the boat, struck and killed the deceased, who died in the boat, or possibly on board the ship to which he belonged at sea. The case was argued twice by counsel, before all the judges but one, upon the question whether the prisoner had been properly tried by the Admiralty tribunal, or whether he ought not to have been tried at common law. They were all of opinion that the prisoner was tried by a competent tribunal, and the prisoner was executed pursuant to the sentence. This case appears to me to be a strong authority for the Crown to this extent, viz., that if the present case had been one of murder and not of manslaughter, if the prisoner, instead of negligently causing his ship to strike the *Strathclyde*, had purposely and of malice aforethought done the same act, the mortal stroke in contemplation of law would have been given where it actually took effect, which having been on board a British ship on the high seas and the death also on the high seas, there could have been no question whatever as to the jurisdiction of the Central Criminal Court to try the offence as one committed on the high seas, and within the jurisdiction of the Admiralty transferred to that Court. Then does the circumstance that the offence here alleged was manslaughter and not murder make any difference as regards the question of jurisdiction ? It is said that it does. The decision in *Combes' Case* was alleged to be supportable on the ground that in the case of murder the intention is presumed to accompany the act, and so the shot which takes effect on the high seas must be presumed to be accompanied thither by the intention with which it is fired, and both there together to operate. I agree that this is the principle upon which *Combes' Case* is founded and I think that such a presumption is one of good sense and sound law. But I fail to see any true principle upon which a distinction can be drawn between a case of murder and a case of manslaughter, so far as the jurisdiction to try is concerned, on the ground that in the one case there is an intention to kill accompanying the stroke and operating at the place where it takes effect, and that in

in one jurisdiction. These cases were much lessened by the rule (established in cases such as that of *Coombe* with regard to murder and the *Seven Bishops case* (12 State Trials 331) with regard to libel) that the act was committed not (necessarily) where the actor was but where the blow fell or the libel was published, but in cases where the death of the victim was part of the offence, a result which might follow days after the blow and after the victim has moved from the place where he received it, this was clearly insufficient. The method by which the difficulty had been got over by the common law courts, when it was a question between two countries, was never applied when it was a question between the jurisdiction of the admiral and of the courts of common law, and the legislature had to step in and thus we get 9 Geo. IV. c. 31 dealing with the facts of *Lacy's Case*, and providing that where the blow was on the high seas and the death in a county, the offence may be tried where the death took place. This is not necessarily the same thing as saying that the act *was committed* where the death took place, and it is certainly going a step further to say that the act took place where the victim died than to say that the act took place where the blow delivered by the accused fell. The English judges in *R. v. Lewis* (1 Dears & B. Cr. Cases 182), quoted by Cockburn C.J. in *R. v. Keyn* at p. 171, felt that this was a step too far and refused to hold that the statute gave the courts jurisdiction in a case where the blow was delivered in a place where the English courts had no jurisdiction at all, viz. in a foreign ship on the high seas. The courts of the U.S. have taken this step, however (see *Comm. v. Macloon*, p. 126 *post*).

the other case there is no such intention. In my opinion, the negligence operates just as much as the intention at the spot where the violence is done, and though death is an ingredient of either offence equally, and, therefore, if death had not occurred within the Admiralty jurisdiction, *Lacy's Case*, but for a subsequent statute, would have applied, I can find no case nor authority of text-writers on English criminal law which furnishes any ground for saying that where the stroke or collision which causes the death and the death itself both occur within a certain jurisdiction, and the case is one either of manslaughter or murder, the mere fact that in the one case there is intention to kill, and in the other case only recklessness causing a killing by precisely the same instrument, makes any difference as to the liability of the prisoner to be tried for 'an offence committed within the jurisdiction.'

"My brother Grove during the argument pointed out one consequence of such a distinction, which I must confess appears to me to be almost conclusive against it. Suppose murder in this case had been charged, and clear jurisdiction admitted on all hands to try for murder if malice prepense were proved, and the jury thinking malice prepense not proved, but negligence established, had found the prisoner guilty of manslaughter, would the Court be bound to set aside the conviction on the ground of negligence only, and not malice, having been proved, though, if intention to kill had been established, it would have held the jurisdiction established? Again, can it be maintained that if a foreigner passing by in his boat fired deliberately at a person on a British ship and killed him he would be triable, but that if he recklessly fired, and killed the same person he would not be triable? It seems to me that this distinction would be contrary to English law, which alone we are to administer, and that it could not be so held without practically overruling *Combes' Case*, by which we ought to abide.

"Upon a question of venue I can find no trace of any authority for saying that there is any such distinction. I must confess that it appears to me impossible to read the case of *United States v. Davis*, in 2 Sumner, p. 482, without coming to the conclusion that Story J. had never heard or thought of the distinction in question, which of itself appears to me to be a very strong argument against its existence. That was a case of manslaughter, and Story J. says :

'I say the offence was committed on board of the schooner; for, although the gun was fired from the ship *Rose*, the shot took effect, and death happened on board of the schooner, and the act was, in contemplation of law, done where the shot took effect.'

"The same view of the law seems to have been entertained by the law officers of the Crown in the year 1725, when our Attorney and Solicitor General, Sir Phillip Yorke and Sir Clement Wearg, advised that a manslaughter committed by firing a gun from a fort in Barbadoes, and unlawfully, though not intentionally, killing a person on board a ship two miles off at sea, was not triable in any court of common law, but either in the Admiralty Court at Barbadoes, or by a special commission under 11 & 12 Wm. III, c.7 (see Forsyth's Cases and Opinions on Constitutional Law, p. 219).

"I therefore feel bound to look at this case exactly as though it were one of murder caused by intentionally running down the *Strathclyde*, so far as the question of jurisdiction is concerned. In such case, would not the charge have been one of an offence committed on British territory, i.e., a British ship on the high seas, by a foreigner, having in contemplation of law entered the British ship,

and there committed the offence afterwards completed by the death of the deceased, within the jurisdiction of the Admiralty? I think it would.

"The case of *Combes*, already referred to, was a case of the trigger pulled ashore, the man killed in a boat at sea. The bullet sent from the shore having done the mischief at sea, it was held that the prisoner had 'committed the offence at sea'. That was a case of murder; but the case of *United States v. Davis*, which was a case of manslaughter, was decided upon the same principle; and it appears to me that the principle is sound and reasonable. Applying that principle to the present case, I can see no reason for drawing any distinction between the case of propelling a bullet from a gun and that of striking with the further end of a spear, or directing the prow of a ship so as to strike either a person or a vessel containing a number of living beings.

"Can a ship, directed by its captain against the hull of another ship, and there inflicting an injury which sends it to the bottom in a few minutes, and drowns its crew and passengers, be more appropriately said to be inflicting the mortal stroke at any place than where she makes the hole, through which the water rushes, which sends the ship to the bottom and drowns those on board? And if, as in this case, she penetrates the skin of the other vessel some feet, must it not be held that the person under whose immediate direction she is does the mischief which is most entitled to be called the 'mortal stroke' on board the ship which is sunk? I think it must."

Denman J. then proceeds to deal with point (b) in the following words: ¹

"But it is argued that the law which gives our Courts jurisdiction to try offences upon the high seas cannot be held to apply to this case, because the prisoner was a foreigner on his own ship and therefore not amenable to our criminal law.

"I am of opinion, however, that the law which makes foreigners liable for the violation of our criminal law for offences committed by them when bodily on our soil, whether there by their own desire or not, is not so restricted as to leave them unpunishable because they may have been on a foreign ship at the time of the commission of the offence."

He concludes as follows: ²

"I have felt bound to write fully upon this point, though it occupied a comparatively small part of the argument, because, in my opinion, it is one of vast importance to the security of British seamen and of persons of all nations sailing in British ships, and therefore entitled to the protection of our laws, throughout the world. I can see no ground for curtailing the generality of our criminal law in such a case as this, or for applying different principles from those which would be applicable to a manslaughter on land. I cannot see that it would in any way interfere with the free navigation of the high seas, for I see no inconsistency between perfect freedom of navigation and a power on the part of each nation to punish those who kill its own subjects, or those of other countries enjoying its hospitality on board its ships, by running them down, whether through design or negligence. On the contrary, I think that the real freedom as well as the safety of navigation would be impaired if we were to place such a limit upon the jurisdiction of our criminal Courts."

¹ 2 Ex. Div. at p. 106.

² 2 Ex. Div. at p. 107.

The judgment of Cockburn C.J. must be taken to be that also of Lush J., Pollock B. and Field J., who confined themselves to concurring in it. The shorter observations on this contention of the remaining five judges will be considered in connexion with the observations of the Lord Chief Justice on the two points which will for convenience be taken separately. He deals first (*a*) with the question where the act was committed.¹ He states that the case of the Crown rests mainly on the authority of *R. v. Coombe*, which has already been quoted. He then quotes the *U.S. v. Davis* in the following words :

“ The case of the *United States v. Davis* is, in like manner, an authority in favour of the view that where a person, firing a gun from a ship, kills a person on board another ship, the offence is in point of law committed on board the latter. Indeed this case goes much farther than *Reg. v. Coombe*, as it was held that, the two ships having been lying in the waters of a local state, the person causing the death under such circumstances was amenable to the local law alone, and not to that of the country to which his ship belonged. The defendant was indicted before a circuit court of the United States for manslaughter. He was the master of an American ship, lying in the harbour of Raiatia, one of the Society Islands. A disturbance having arisen on board the ship, the defendant took his gun in hand, and the gun going off—whether fired purposely or not was uncertain—a man on board another vessel was unintentionally killed. The Court held, on the authority of *Coombe’s Case*, that the offence, if any, had been committed on board a foreign vessel in the jurisdiction of a foreign government, and that an American court had, therefore, no jurisdiction to try him.

“ The *ratio decidendi* in these cases does not appear in the reports ; and it becomes desirable, therefore, to see by what principle the decision in such a case should be governed.”

He then explains, as Denman J. had done, that *Lacy’s Case* and similar decisions are not relevant. He says :

“ We have, in this instance, not the case of the blow or wound in one jurisdiction, and the death in another ; but, as in *Reg. v. Coombe*, one in which the act causing the death begins in one jurisdiction and extends into another, in which it inflicts the blow or wound, from which, as its cause, death ensues. When a man strikes a blow with a club, or inflicts a wound by the thrust of a sword, or the stab of a knife, or blows out another’s brains by putting a pistol to his head, the act takes effect immediately. If he hurls a stone, or discharges a bullet from a gun or pistol at another person, at a distance, the instrument he uses passes from him ; the stone or bullet, having left his hand, has to make its way through a given space before it strikes the blow it is intended to inflict. But the blow is as much the act of him who casts the stone, or fires the gun, as though it had taken effect immediately. In such a case the act, in lieu of taking effect immediately, is a continuing act till the end has been effected, that is, till the missile has struck the blow, the intention of the party using it accompanying it throughout its course. The act must be taken to be the act of the party in the effects it was

¹ 2 Ex. Div. at p. 232.

intended to produce, till its agency has become exhausted and its operation has ceased. When, therefore, a person being in one jurisdiction fires a shot at a person who is in another, as was the case in *Reg. v. Coombe*, it may well be held that the blow struck by the bullet is an act done in the jurisdiction in which the bullet takes effect. Whether the converse of the proposition will equally hold—whether it can equally be said that the continuing act is not done in the jurisdiction in which it originates, and in which the missile is set in motion—in other words, whether the case of *United States v. Davis* was rightly decided,¹ is a different question, as to which I do not think it necessary now to express an opinion beyond saying that, should the question arise, it would be deserving of very serious consideration. It is enough for the present purpose to say that *Reg. v. Coombe* was, in my opinion, rightly decided; and I think the same principle would apply where the master of a vessel purposely ran down another, and by so doing caused the death of a person on board. For, though his immediate act is

¹ This query raises the question as to the validity of the other theory, that of *subjective territorial jurisdiction*, jurisdiction derived from the presence of the accused on the territory at the time of the commission of the offence. Though it does not arise in this case, one or two observations may not be out of place. No system of municipal law is likely to penalize a person simply on the ground that he was in the jurisdiction, when an offence was committed by him somewhere else. But a person within the jurisdiction cannot in fact commit an offence somewhere else without doing *something* within the jurisdiction. What he does within the jurisdiction may be very little, posting a letter, a conversation with an agent and so on till we get to the discharge of a gun. The question of international law on this point is: how much is required in the case of a foreigner to be done within the territory to found jurisdiction? Two answers are possible: (1) a complete offence—something which disturbs public order within the territory; (2) whatever the municipal law of the state where the criminal was at the time chooses to make punishable.

If the first answer is correct, then subjective territorial jurisdiction is not recognized in international law as an independent ground of jurisdiction (see page 111 *antea* on the question of necessity of the combination of both subjective and objective jurisdiction). It is submitted that this answer is not correct. So far as English law is concerned it is clear it is not consistent with the first answer. The point was taken and rejected in *R. v. Holmes* (12 Q.B. p. 23). The prisoner wrote and posted in Nottingham a letter addressed to a person in France containing a false pretence by means of which he induced the recipient to transmit to Nottingham a draft for £150 which the prisoner cashed there. The conviction was upheld. The prisoner was not a foreigner but there is no reason to suppose that the decision could have been otherwise if he had been.

The decision of Story J. in the American case of *U.S. v. Davis* was of course a decision of municipal law and is quite consistent with the second answer as a proposition of international law. The old principle of English law requiring in cases of murder or manslaughter that the *death* should take place within the *venue* (or the jurisdiction) as well as that the blow should fall there need not have any application in international law, even if the first answer were the correct one. It has disappeared entirely from English law with the abolition of the old rules about *venue*. In *R. v. Armstrong* (13 Cox C. Cases 185) Archibald J. held, in a case of murder, that it was not necessary that the act should be completed on the British ship and he asserted jurisdiction in a case where the victim was killed by being thrown out of a British ship into the waters of a foreign river and drowned. Nevertheless, if it was applicable in the U.S. at the time of that decision, then the judgment in the *U.S. v. Davis* must certainly have been right, since clearly the death took place out of the jurisdiction, even if part of the act of striking took place there.

confined to running his ship against the other, it is, nevertheless, his act which causes the ship run down to sink. It is as much his act which causes the death of the person drowned, as though he had actually thrown such person into the water. If, therefore, the defendant had purposely run into the *Strathclyde*, I should have been prepared to hold that the killing of the deceased was his act where the death took place, and, consequently, that the act—in other words, the offence of which he has been convicted—had been committed on board a British ship.”

To stop for a moment at this point, so far Cockburn C.J. agrees with Denman J. If the case had been one of murder or any other intentional act, then it would be right to hold that the act of Keyn had been committed on the British ship, the *Strathclyde*, but he continues :

“ Whether the same principle would apply to a case of manslaughter, arising from the running down of another ship through negligence, or to a case where death is occasioned by the careless discharge of a gun, is a very different thing, and may, indeed, admit of serious doubt. For, in such a case, there is no intention accompanying the act into its ulterior consequences. The negligence in running down a ship may be said to be confined to the improper navigation of the ship occasioning the mischief ; the party guilty of such negligence is neither actually, nor in intention, and thus constructively, in the ship on which the death takes place.”

Here is the first point of difference. Cockburn C.J. held that a negligent blow does not take place where it falls but an intentional blow does, whereas Denman J. states that he is unable to find such a distinction. Sir Robert Phillimore, in a judgment which must be regarded as that both of himself and of Kelly C.B. takes the same point.¹ So do both Brett ² and Bramwell JJ.A.³

¹ 2 Ex. Div. at p. 66. He says : “ Looking at the facts stated by the learned judge who tried the case, as well as the indictment, it appears that the prisoner had not intention to injure the *Strathclyde* or any person on board of her. He was guilty of negligence, and want of nautical skill, and of presence of mind in the management of his vessel, and thereby caused the collision, but the act by which the woman died was not his act, nor was it a consequence immediate or direct of his act (*sic*). He never left the deck of his own ship, nor did he send any missile from it to the other ship ; neither in will nor in deed can he be considered to have been on board the British vessel. He can no more be considered by intendment of law to have been on board the British vessel than he would have been if his bad navigation had caused the *Strathclyde* to impale herself upon the *Franconia*, and so to sink. The jurisdiction of the English Court, therefore, cannot be founded on this contention.” The words “ but the act by which the woman died was not his act nor was it a consequence immediate or direct of his act ” must be a misprint or else a slip, for if the death of the woman was not a direct consequence of his act, Keyn could not be guilty of manslaughter of her.

² 2 Ex. Div. at p. 148. He says : “ As to the question of whether the criminal offence charged in this case, namely, the offence of manslaughter, was committed on board of the foreign ship or on board of the British ship, I agree entirely with the L.C.J. that it was not committed on board of either. There was not jurisdiction, therefore, given in respect of a complete offence committed locally within the British ship.”

³ 2 Ex. Div. at p. 150. “ As to the other point, that the offence was committed on

Amphlett J.A. on the other hand does not on this point agree with Cockburn C.J. but with Denman J., for he says :¹ " Now according to the decision in *R. v. Coombes* the crime must be, for the purpose of determining the venue, held to have been committed on the English ship when the death occurred ; . . ." On this point therefore—that a distinction must be drawn between intentional and negligent acts—there is a majority in favour of such a distinction of eight judges to four.

Cockburn C.J., however, proceeds to give another reason for rejecting jurisdiction. He says² that, assuming for the purposes of argument that the act of the accused was committed on the British ship and so within the jurisdiction, the accused himself was all the time on the German ship and never within the jurisdiction.

" But, in order to render a foreigner liable to the local law, he must, at the time the offence was committed, have been within British territory if on land, or in a British ship if at sea. I cannot think that if two ships of different nations met on the ocean, and a person on board of one of them were killed or wounded by a shot fired from the other, the person firing it would be amenable to the law of the ship in which the shot took effect. According to the doctrine of Lord Coke in *Calvin's Case*, protection and allegiance are correlative : it is only where protection is afforded by the law that the obligation of allegiance to the law arises ; or, as I prefer to put it, it is only for acts done when the person doing them is within the area over which the authority of British law extends, that the subject of a foreign state owes obedience to that law, or can be made amenable to its jurisdiction. But for the opinion expressed by my Brother Denman, I should have thought it beyond all dispute that a foreign ship, when not in British waters, but on the high seas, was not subject to our law. Upon this point I had deemed all jurists unanimous, and could not have supposed that a doubt could exist. Upon what is the contrary opinion founded ? Simply upon expediency, which is to prevail over principle. What, it is asked, is to happen if one of your officers, enforcing your revenue laws, should be killed or injured by a foreigner on board a foreign ship ? What is to happen if a British and foreign ship meeting on the ocean, a British subject should be killed by a shot fired from the foreign ship ? In either of such cases would not the foreigner guilty of the offence be amenable to the English law ? Could it be endured that he should escape with impunity ? If brought within the reach of a British Court of justice, could he not be tried and punished for the offence, and ought he to be permitted to escape with impunity, or ought he not to be tried and punished for such offence ? My first answer is,

a British ship, it seems to me enough to say that the offence of manslaughter consists of an act, and its result—death. Here the act was on the Prussian ship, the result, death was in the water. It is said, suppose there was an indictment for murder, would not the Admiralty have jurisdiction if the act was wilful, and if it had, would not a conviction for manslaughter be possible ? I say, No. If the act was wilful it is done where the will intends it should take effect ; aliter when it is negligent. The same argument might be used as to a murder in mid-Atlantic."

¹ 2 Ex. Div. at p. 119. For a further quotation of Amphlett J.A.'s views see note 1, page 124.

² 2 Ex. Div. at p. 235.

that the alternative is fallacious. He will not escape with impunity. He will be amenable to the law of his own country, and it is not to be presumed that the law of any civilized people will be such, or so administered, as that such an offence should escape without its adequate punishment. . . . I think, therefore, that it is not enough that the running down the *Strathclyde*, and so causing the death of the deceased, can be said to have been the act of the defendant on board the latter vessel, unless it can be made out that the defendant was also on board of it. But the defendant certainly was not actually, nor do I think—no intention on his part having accompanied the act—he can be said to have been, in any sense, constructively, on board the *Strathclyde*. If, therefore, his own vessel was not within British waters, but on the high seas, he owed no obedience to the law of this country, and cannot be punished for an infraction of it. . . .

“I am aware that this view is not in accordance with the decision in the American case of *Adams v. The People*. In that case a fraud had been committed at New York by the defendant, a citizen of the state of Ohio, and residing in it, through an agent, at New York, who was wholly innocent and ignorant of the fraud. The accused set up as a defence that he was a citizen of another state, and residing in it when the alleged offence was committed, and therefore not subject to the law of New York; but the objection was overruled, on the ground that a criminal act done through the instrumentality of an innocent agent is in law the act of the principal, who may therefore be held to have committed the offence in the state in which the act was done, and, being found in that State, will be liable to be there tried and punished.

“But the judgment in that case which, by the way, is remarkable for much loose reasoning and idle talk about the law of nature, is not, to my mind, at all satisfactory. It entirely overlooks what, in my view, is the turning point in the case, namely, that though the act of the accused had been committed within the jurisdiction, the defendant, being a foreigner, and having been out of the jurisdiction when the act was done, owed no allegiance to the law of New York, and was not punishable under it.”

Unless the sentence “nor do I think—no intention on his part having accompanied the act—he can be said to have been in any sense constructively on board the *Strathclyde*” can be taken as indicating that in intentional crimes the actor can be said himself to have been constructively where his act was committed, this passage is a rejection of the objective territorial theory *in toto*. As such it must be read, for the argument is that jurisdiction only exists where there is protection and allegiance, and allegiance only arises (in the case of a foreigner) where he comes within the jurisdiction, and that argument is inconsistent with any “constructive presence” even in intentional crimes.

Amphlett J.A. took the same view as the Lord Chief Justice on this point, though he expressed doubt on a point on which the Lord Chief Justice said he would have thought that no doubt could exist.¹

¹ 2 Ex. Div. at p. 118. “I will first dispose of the second ground, which of course is quite independent of the three-mile zone, and if valid would justify the conviction of the

None of the other judges expressed any opinion on this point, and the majority is therefore in this case five to three (or perhaps two—Lindley J. should perhaps not be counted).

When Cockburn C.J. says that the offender “ will be amenable to the law of his own country ” in cases where a foreigner commits an offence in England without ever coming within the jurisdiction, he had obviously the particular case of negligent navigation of a foreign ship in his mind. Otherwise his statement is far too wide. Some countries do make all offences committed by their nationals anywhere punishable by their own laws. A large number of other countries, including England, do not do so. The doctrine if correct will certainly leave a large number of “ mixed ” offences unpunished. The national state of the accused or the country where he was at the time (and they may not be the same) may very probably by their own laws have no jurisdiction when the offence was not committed in their territory, even though the accused was there at the time, and if they have jurisdiction may have far less inducement to exercise it than the country where the offence took place. This, however, as Cockburn C.J. says, may be an argument of convenience, but it is a strong one of its kind. His assertion of the principle that there is no jurisdiction over a foreigner unless he was at the time of the offence within the jurisdiction is to say the least of it more confident and categorical than the case seems to warrant. No authority for the proposition is given. Not a single case is quoted where any English court has held that it had no jurisdiction in respect of an offence committed in England by a foreigner on the ground that the accused was not in England at the time. (Indeed such a view would mean that a foreigner, who had by letters from abroad succeeded in swindling persons in England might directly he had obtained the money come over by the next boat to spend it in England with impunity—another argument of convenience, but results so absurd inevitably lead to some doubts as to the correctness of the principle.)

The only case on the point which the Lord Chief Justice quotes prisoner had the offence been committed in the middle of the ocean. Now, according to the decision in *R. v. Coombes*, the crime must be, for the purpose of determining the venue, held to have been committed on the English ship where the death occurred ; but that doctrine, founded as it is upon a convenient fiction, and binding no doubt upon a British subject, does not decide the question before us, which is, whether a foreigner who committed the offence while he was *de facto* outside the English territory, could be made amenable to English law. With some doubt I have come to the conclusion that he could not. I can find no authority for saying that a state has any jurisdiction to punish a foreigner who at the time of the commission of the offence was not within the territory, and consequently not owing it any allegiance.”

is an American case which as he says is an authority to the contrary, *Adams v. The People*. Subsequent to the judgments in *R. v. Keyn*, *Adams v. The People* was followed in the United States in the case of the *Comm. v. Macloon et alios* (101 Mass. 1869), where the United States court asserted jurisdiction and convicted of manslaughter two British subjects, members of the crew of a British ship, who had ill-treated another member of the crew while the ship was on the high seas in such a manner as to cause his death, which took place after the vessel arrived in a United States port. No protest was ever made by the British Government on the ground that the courts of the United States had no jurisdiction in respect of acts committed by British subjects at a time when they were not within the jurisdiction of the United States. It has further been followed many times by the Supreme Court of the United States, notably in *Strassheim v. Darby*, 221 U.S. 280, and on April 11, 1927, in the case of *Ford and others v. United States of America* in which the Supreme Court upheld the conviction of a number of British subjects, including three officers of a British ship, for conspiracy against the liquor laws of the United States "in the bay of San Francisco," when the accused at the time of the alleged conspiracy and the alleged overt acts were *not* in the Bay of San Francisco but on the high seas outside the jurisdiction of the United States. A whole line of American cases is quoted in the judgment of Taft C.J. in support of this view.

Moreover, since the date of *R. v. Keyn* decisions have been given by English courts which are quite inconsistent with the doctrine.

In 1908 Phillimore J. convicted at the Central Criminal Court a foreigner under section 44 of the Larceny Act 1861 of demanding money with menaces. The defendant was in Hungary at the time and gave letters containing the menaces to an agent there, who posted them in Russia, and they were received in London.¹

In 1884² three judges of the Queen's Bench (Cave, Day, and A. L. Smith J.J.) upheld the order of a magistrate ordering the extradition to Germany of Nillins (apparently a British subject, though nothing as to his nationality appears in the report) who, being in Southampton, wrote letters to Germany containing false pretences and thereby induced persons in Germany to deliver goods in Hamburg to certain other persons to his order. The Law

¹ See *R. v. Veltheim* : Russell on Crimes, 8th ed., at p. 55.

² *R. v. Nillins*, 53 L.J.M.C. 157.

Officers of the Crown appeared and argued in favour of jurisdiction. If the doctrine of Cockburn C.J. were correct, Germany would have had no jurisdiction over the criminal acts of a person who was not a German and who had not been to Germany at all. If the court had been of that opinion, it could not have sanctioned his extradition. If the British Government had been of the opinion that Cockburn C.J.'s doctrine was international law, the Law Officers of the Crown would not have appeared and argued in favour of the order.

The judgment of the majority of the court in *R. v. Keyn* possesses an authority far greater than that possessed by most decisions of any English courts inferior to the House of Lords by reason of the elaborateness of the arguments, the lengthy consideration given by the court to their judgments, and the number of judges taking part in the decision. Nevertheless, on this particular point, whether in order to create jurisdiction over a foreigner in respect of a criminal offence it is necessary not only that the offence should be committed within the jurisdiction but also that the accused should himself have been within the jurisdiction at the time, there are several facts which detract from the authority which the judgment possesses on the other points in the case. It was not essential for the decision in the case, but was an alternative ground for rejecting jurisdiction, the decision that the act was not committed within the jurisdiction being in itself sufficient for the decision. This point was only considered by eight members of a court of thirteen judges. No authority is cited in support of it and there are now both English and American decisions to the contrary. In these circumstances it cannot be said to be a binding authority in any English court, which would be free to weigh with it the arguments put forward to the contrary by the judges who were in the minority and the practical difficulties which Cockburn C.J.'s principle might create in its application.

On the other hand the decision of the majority of the court on the first point—namely, that when a foreigner navigating a foreign ship by criminal negligence causes his ship to ram and make a hole in a British ship causing the death of persons therein, the crime cannot be said to be committed on the British ship, though if he had rammed her intentionally it would have been committed there¹—rests upon a distinction which, though apparently subtle,

¹ Moore, *Digest of International Law*, Vol. II, § 202, seems in one passage to confine the application of the principle that an act is committed where it takes effect to intentional crimes.

may nevertheless be sound. The comparison of the reasoning of the Lord Chief Justice and Denman J. on this point is interesting. In any case, for an English court of first instance it must stand as a binding authority as to English law upon this point. In the two American cases which are decisions to the contrary effect,¹ the possibility of this distinction does not appear to have been considered.

¹ Namely *U.S. v. Davis*, and *The Comm. v. Macloon*.

RETALIATION IN NAVAL WARFARE

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INTERNATIONAL law has at its disposal certain means for insuring compliance with its rules, as and when these rules are broken. Among these methods is that of reprisals or retaliation, by which one belligerent retaliates upon another by acts which are otherwise illegitimate in order to force his adversary to cease from the commission of illegitimate acts of warfare and to compel him to comply with the rules of international law. Retaliation may be resorted to by a belligerent to compensate himself for wrongful acts done ; more frequently in order to secure a cessation of the illegitimate acts of which he complains.

All the codes of warfare published by states recognize the legitimacy of reprisals, but every attempt which has hitherto been made to regulate them by international agreement has been unsuccessful. These attempts were made at the Brussels Conference of 1874 and at The Hague Peace Conferences of 1899 and 1907 with reference to land warfare. No similar attempts have been made as regards naval warfare, but that a right of retaliation exists both in land and sea warfare is incontestable ; and the war of 1914-18 unfortunately afforded examples too numerous to mention in detail.

The principle of reprisals or retaliation may be established by analogy to the rules of the so-called natural law, and also to those of the common and civil law. Where there is a bilateral engagement and one of the parties refuses to fulfil his part, the other is exonerated from his share in the undertaking. So, too, when a state is prosecuting its demand by war it cannot in reason be expected to observe all the rules at the risk of defeat or of leaving its forces exposed to avoidable suffering, when its adversary has refused to keep those rules.

In the course of reprisals or retaliation it follows that one man is punished for the wrongful acts of another, a measure in itself clearly repugnant to all feelings of justice. It has, therefore, been universally held that belligerents are bound not to resort to such

a proceeding in haste or by the exercise of excessive measures, but only under pressure of necessity when no other means appear to be capable of deterring the enemy from the commission of his offences. The method of reprisals need not be identical with the wrong done.

The subject involves the fundamental ideas as to the real nature of war, whether it is the relation of state to state, and to what extent, if any, the citizens of a state other than the combatant forces are involved. It is a subject on which much has been written, and we cannot now enter into the realm of philosophic theory—valuable though it may be. It is preferable to accept the summary of the arguments given by Westlake, who, after examining the subject from both the inductive and deductive standpoints, lays down broadly the following positions :

1. War is undoubtedly a relation of state to state whatever else it may be as well.

2. War establishes between each of the states which are parties to it and the subjects of the enemy state a relation which entitles the former to treat them as identified with their state, in other words, as enemies so far as the necessities of war require under the limitations which are recognized as being imposed by humanity. . . . The men who form a state are not allowed to disclaim their part in the offences alleged against it, whether those on account of which the war was begun or those charged as having been committed by it in the course of the war, or therefore to claim that hostile action shall not be directed against their state through them in their respective measures. And this is just. Whatever is done or committed by a state is done or committed by the men who are grouped in it, or at least the deed or the commission is sanctioned by them. The state is not a self-acting machine. And if we look more closely at the facts, we shall probably find that in the foreign affairs of a state the rulers more often act under the impulse of a mass than by its tacit permission, and that tacit permission is seldom conceded by the mass except to those who embody and represent the national character.

3. War establishes no direct relation between the members of the respective belligerent states, and in that sense it is true that war is not a relation of individual to individual. The personalities of a state and its subjects are distinct To use the analogy of private law, a state may be described as a corporation or technical person, though not as one with limited liability. The limitation by the laws of war of the hostile action which may be taken against an individual is analogous, not to any limitation in private law of a shareholder's liability for the debts of a company in which the shares are held, but to the joint effect in private law of the principle that the incorporated company must be the primary object of attack, the shareholder's liability, even though unlimited, being only subsidiary to that of the company, and of whatever limitation the law may have imposed for the sake of humanity on the execution to be obtained against a debtor in any case.¹

¹ *Collected Papers*, p. 269.

It is necessary to be clear on this relation of the state to the individuals composing it because as regards the question of retaliation it becomes of importance. This is especially so as regards naval warfare, where the capture of privately owned property is recognized as legal by the general consensus of states, and has been universally practised.

War, says Dana,¹ is undertaken to cause your enemy to do the act of justice assumed to be necessary, and nations must have it in their power to coerce the body politic with which they are at war by a coercion applied to all its citizens in all their interests and to identify the private interests of each of their subjects with the national fortunes in the war. Students of naval history who accept Mahan's views on the nature and object of naval warfare recognize the truth of his doctrine that property belonging to private individuals embodied in the process of commerce is like money in circulation. It is national in its employment and only private in its ownership. To stop such circulation is to sap national prosperity, on which war depends for its energy.

When there has been a violation of the laws of war, retaliation in naval warfare is primarily directed against the delinquent state and may take the form of denying it and its citizens certain rights and immunities to which they have become entitled either by the general rules of international law or under special convention. The only limitation on the right is the overriding law of humanity; for instance, because state A sinks at sight the merchant ships of state B, state B does not become entitled to retaliate by doing the like. Hence it is within the competence of the offended state to declare that certain property otherwise immune from capture shall cease to enjoy the immunity, as a retaliation for illegal practices, and that trade which the belligerent subjects have hitherto carried on shall henceforth be restricted or forbidden.

It will rarely happen that illegalities committed in naval war by one belligerent will affect the other belligerent alone. Experience has shown that invariably neutral rights, or alleged rights, will be involved. Moreover, it has also been demonstrated by experience that when the injured belligerent decrees reprisals, neutral rights, or alleged rights, will likewise come into conflict with the methods of reprisals adopted. In land warfare such complications are not often likely to occur, though even here it may happen that neutral-owned property will suffer, as where devastation of a territory has been ordered by way of reprisals.

¹ Dana's note to Wheaton, p. 401.

In the Napoleonic Wars, and again in the war of 1914-18, Great Britain resorted to reprisals at sea to meet illegal acts on the part of an adversary ; and in the latter war also Germany and the Central Powers resorted to acts which they also sought to justify under the name of reprisals. In 1812 the United States went to war with Great Britain on account, amongst other reasons, of the exercise of the right of retaliation against France whereby her interests as a neutral state were affected. The war of 1812-14 was inconclusive as regards the objects for which it was waged. The Treaty of Ghent is silent on the important questions which were the *casus belli*. Again, in the course of the war of 1914-18, when Great Britain and France decreed reprisals against Germany and the Central Powers, protests were made by the United States and other neutral Powers. In this case, however, the United States and other neutrals took up arms in the cause of Great Britain and the Allies and proceeded to perform acts on the high seas in conjunction with the British Fleet for which, apart from the doctrine of retaliation, it may not be so easy to find a safe line of legal defence. I refer here to the work done by the United States Navy in its co-operation in the establishment of the North Sea barrage in laying the mine-field between Orkney and the coast of Norway with a view to limiting the passage of German submarines and of restricting their access to the Atlantic through the southerly and more dangerous channels. On this operation Professor Hyde makes the following observations :

“ The nature of the service in which those vessels were then engaged and the effect of their operations (if not so thwarted) upon the duration, if not the outcome of the conflict, together with the insufficiency of other means of combatting them, will doubtless be acknowledged to have justified recourse to this extraordinary and efficacious measure, despite the restrictions which it necessarily imposed upon neutral shipping.”¹

The history of the British and French proceedings during the Napoleonic Wars would involve a study of the British Orders in Council and of the famous Berlin and Milan Decrees. Suffice it to say that the Berlin Decree, issued by Napoleon on November 21, 1806, after making charges of illegality against Great Britain, proceeded to declare that the whole of the British Islands were in a state of blockade, and prohibited all trade and intercourse with them. Neutral ships were threatened with condemnation for breach of this decree. To this the British Order in Council retaliated by prohibiting the trade of neutrals

¹ *International Law*, Vol. II, p. 422.

between two ports, one of which should be in possession of France, and likewise threatened condemnation of neutral vessels violating the Order. The foundation of this Order in Council was stated to be that the attempts of the enemy illegally to prohibit the commerce of neutrals with British dominions gave an unquestionable right of retaliation and warranted Great Britain in enforcing the same prohibition upon all commerce with France. The Milan Decree, with still greater severities, followed on December 17, 1807, and in its turn it was followed by the British Order in Council of April 26, 1809. Many cases were heard and decided in the British Prize Courts under these Orders in Council by Sir William Scott (Lord Stowell), and many of these were affirmed by the Lords of Appeal. Of the latter decisions some were first brought forth from the public records during the arguments in cases during the late war, though there were plenty of decisions by Sir William Scott in the Law Reports showing that retaliation was recognized by the British Prize Courts as a legal right, and that breach of the blockade of France was not the only basis of the decisions. It may be stated that apart from the questions of blockade, Sir William Scott proceeded on the principle that where there is a just cause for retaliation neutrals may by the law of nations be required to submit to inconvenience from the act of a belligerent Power ordering retaliation greater in degree than would be justified had no cause of retaliation arisen.¹ His words on this point are very explicit :

“Retaliatory measures they are. I have no hesitation in saying they would cease to be just if they ceased to be retaliatory, and they would cease to be retaliatory from the moment the enemy retracts in a sincere manner from those measures of his which they are intended to retaliate. So far, this retaliatory blockade (if blockade it can be called) is coextensive with the principle that neutrals are prohibited to trade with France because they are prohibited by France from trading with England.”²

At the time when Sir William Scott was administering the law of the Prize Court it was a recognized rule of Anglo-American Prize Law that enemy goods were liable to capture under any flag. It was an old rule dating back to the *Consolato del Mare* of the thirteenth or fourteenth century, and it is surprising to read Mahan's statement that in the Seven Years' War “it suited England to maintain that enemy's property was liable to capture on board neutral ships, thus subjecting these nations not only to

¹ See also *The Zamora* (1916) A.C. 77, 97.

² *The Fox* (1807), Edwards 314-21. Cf. *The Snipe* (1812), *ibid.* 381-3.

vexatious detention but to loss of valuable trade".¹ This was nothing new, but at the opening of the war in 1914 this rule had been changed as regards the signatories of the Declaration of Paris, of which the United States is not one, so that under it, enemy goods, except contraband of war, are free when under a neutral flag. This is undoubtedly a serious restriction on belligerent rights. Until the issue by Great Britain and France of the Retaliatory Order and Decree of March, 1915 (Portugal adopted the same rule in August, 1916), the rules of the Declaration of Paris were observed. In consequence of the German violations of the laws of war, violations against which no neutral state made an effective protest though their citizens were seriously affected thereby, the British Order in Council of March 11, 1915, and the corresponding French Decree purported to stop all trade between Germany and the outer world. No neutral vessel was to be allowed to proceed to any German port. Goods on board were to be discharged in a British or French port and detained for the duration of the war. No vessel which sailed from a German port was to be allowed to proceed with goods laden in such port. Goods on board were to be discharged in British or French ports and detained or sold, and the proceeds held till the end of the war. Vessels carrying goods to any port other than German, but with an enemy destination, were subject to similar treatment, as were also vessels having on board goods of enemy origin or enemy ownership. Subsequently this order was extended to the other Central Powers on January 10, 1917, and on February 16, 1917, after the German War Zone decree of February 1, 1917, which was declared to be "in flagrant contradiction with the rules of international law, the dictates of humanity, and the treaty obligations of the enemy", all vessels encountered at sea on their way to or from a port in any neutral country affording means of access to enemy territory without calling at a British or Allied port were, until the contrary was established, declared to be carrying goods with an enemy destination or of enemy origin, and were to be brought in for examination and, if necessary, for adjudication by a Prize Court. Goods found to be of enemy origin or destination and the vessels carrying them were to be liable to condemnation. It will be noticed that the complications caused by the use of the term "blockade" in the Napoleonic Orders in Council were avoided by the non-user of this term in these Orders in Council, though the effect undoubtedly was of a similar character to that obtained by blockade.

¹ A. T. Mahan, *Influence of Sea Power on History* (12th ed. 1896), p. 312.

It may be well at this point to note that when the Judicial Committee of the Privy Council decided in the case of the *Zamora*¹ that the Prize Court was not bound by executive acts such as Orders in Council which violated the law of nations, it laid down the principle that as regards Orders in Council authorizing retaliation the facts recited as showing that a case for reprisals existed would be treated as conclusive as to the opinion of His Majesty's advisers of the best and only means of meeting the emergency, but it would not preclude the right of the Court to hold that the means taken were unlawful as entailing on neutrals a degree of inconvenience unreasonable considering all the circumstances of the case.

What then were the facts which led to the issue of these Orders in Council decreeing retaliation first against the German and then against the other Central Powers? They are recapitulated by Sir Samuel Evans in his judgment in the case of the *Leonora*:

"In the first week of February, 1915—I think on February 4—the German Government issued an official declaration that the English Channel, and north and west coasts of France, and all waters round the British Isles would be treated as a 'war area', and that all enemy ships, whatever their character, found in that area would be destroyed, and neutral vessels would be exposed to danger. Even before this the enemy had shown how they were prepared to treat vessels belonging to their adversaries, whatever the class or mission of such vessels might be. Near the end of October, 1914, a German torpedo had sunk a French passenger steamer—the *Amiral Ganteaume*—with more than 2,000 unarmed refugees on board, including a large proportion of women and children. By good fortune a British steamship, happening to be near, succeeded in rescuing most of the passengers, but a considerable number lost their lives.

"The declaration by Germany of the 'war area' already referred to was communicated by this country to all the important neutral countries (including, of course, Holland and Sweden), in a Note dated March 1, 1915. The Note commented upon the declaration and also foreshadowed the retaliatory measures which would be adopted, and were afterwards incorporated in the Order in Council of March 11, 1915.

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"Then followed in due course the first Order in Council as a retaliatory order. It recited that the German Government had issued certain Orders which in violation of the usages of war purported to declare the waters surrounding the United Kingdom a military area, in which all British and Allied merchant vessels would be destroyed, irrespective of the safety of the lives of passengers and crews, and in which neutral shipping would be exposed to similar danger in view of the uncertainties of naval warfare, and had warned neutrals against entrusting crews, passengers or goods to British or Allied ships. It contained further recitals to the effect that the enemy's conduct gave to this country an unquestionable right to retaliation; that His Majesty had therefore decided to adopt measures in order

¹ (1916) 2 A.C. 77.

to prevent commodities of any kind from reaching or leaving Germany, but that such measures would be enforced without risk to neutral ships or to neutral noncombatant life, and in strict observance of the dictates of humanity; and that the object of such measures was to restrict the commerce of Germany.

“ To revert to the history of the enemy’s conduct at sea after the declaration of February, 1915, the German authorities lost no time in carrying into effect their threats. Their submarines sank British ships and destroyed lives of innocent persons in March. In April they sank Dutch, Swedish and Portuguese ships (Portugal at that time being neutral). They also torpedoed a Belgian relief ship without warning and sank her in five minutes, causing the loss of 17 lives—although it was in the daytime and the vessel was flying the Belgian Relief Commission’s flag and displaying the Commission screens on both sides, marked ‘ Commission Belgian Relief, Rotterdam ’, in letters over 2 ft. high; and had actually been granted a safe conduct by the German consul at The Hague.

“ And it will be remembered—can it ever be forgotten?—that on May 7, the *Lusitania* was torpedoed and sunk when she was carrying nearly 2,000 persons of all classes and ages, and that in the frightful disaster 1,198 men, women and children were drowned. No more callous or cruel crime has been committed since the day of Cain. . .

“ In the beginning of 1917 the severity of the submarine atrocities was to be increased, and a formal announcement of an almost unlimited submarine warfare in European waters was made by a Memorandum of the German Government, which was expressly directed against ‘ all sea traffic ’.”¹

These were the facts on which the Retaliatory Orders in Council were based and which claimants were not allowed to dispute, but neutrals could plead that the measures taken as reprisals inflicted on them an unreasonable measure of inconvenience.

The British Prize Court has on more than one occasion emphasized its position as a protector of neutral rights, and in the case of the *Stigstad*, in which the first of the retaliatory orders was upheld, Lord Sumner said of the court :

“ Its function is, in protection of the rights of neutrals, to weigh on a proper occasion the measures of retaliation which had been adopted in fact, and to inquire whether they are in their nature and extent other than commensurate with the prior wrong done, and whether they inflict on neutrals, when they are looked on as a whole, inconvenience greater than is reasonable under all the circumstances.”²

In the following passage from the same judgment the court proceeds to explain the principles which were to guide it in estimating the reasonableness of the inconvenience to which neutrals were subjected :

“ In considering whether more inconvenience is inflicted upon neutrals than the circumstances involve, the frequency and the enormity of the original wrongs

¹ *Brit. and Col. Prize Cases*, Vol. III, p. 181.

² L.R. (1919), A.C. 286.

are alike material, for the more gross and universal those wrongs are, the more are all nations concerned in their repression, and bound for their part to submit to such sacrifices as that repression involves. It is right to recall that, as neutral commerce suffered and was doomed to suffer gross prejudice from the illegal policy proclaimed and acted on by the German Government, so it profited by, and obtained relief from, retaliatory measures, if effective to restrain, to punish and to bring to an end such injurious conduct. Neutrals, whose principles or policy lead them to refrain from punitive or repressive action of their own, may well be called on to bear a passive part in the necessary suppression of courses which are fatal to the freedom of all who use the seas.

“The argument principally urged at the bar ignored these considerations, and assumed an absolute right in neutral trade to proceed without interference or restriction, unless by the application of the rules heretofore established as to contraband traffic, unneutral service and blockade. The assumption was that a neutral, too pacific or too impotent to resent the aggressions and lawlessness of one belligerent, can require the other to refrain from his most effective, or his only, defence against it, by the assertion of an absolute inviolability for his own neutral trade, which would thereby become engaged in a passive complicity with the original offender. For this contention no authority at all was forthcoming. Reference was made to the Orders in Council of 1806 and 1809 which were framed by way of retaliation for the Berlin and Milan decrees. There has been much discussion of these celebrated instruments on one side or the other, though singularly little in decided cases or in treatises of repute ; and, according to their nationality or their partisanship, writers have denounced the one policy or the other, or have asserted their own superiority by an impartial censure of both. The present Order, however, does not involve for its justification a defence of the very terms of those Orders in Council. It must be judged on its merits and, if the principle is advanced against it that such retaliation is wrong in kind, no foundation in authority has been found on which to rest it. Nor is the principle itself sound. The seas are the highway of all, and it is incidental to the very nature of maritime war that neutrals, in using the highway, may suffer inconvenience from the exercise of their concurrent rights by those who have to wage war upon it. Of this fundamental fact the right of blockade is only an example. It is true that contraband, blockade, and unneutral service are branches of international law which have their own history, their own illustrations, and their own development. Their growth has been unsystematic, and the assertion of right under these different heads has not been closely connected or simultaneous. Nevertheless, it would be illogical to regard them as being in themselves disconnected topics or as being the subject of rights and liabilities which have no common connexion. They may also be treated, as in fact they are, as illustrations of the broad rule that belligerency and neutrality are states so related to one another that the latter must accept some abatement of the full benefits of peace in order that the former may not be thwarted in war in the assertion and defence of what is the most precious of all the rights of nations, the right to security and independence. The categories of such cases are not closed. To deny to the belligerent under the head of retaliation any right to interfere with the trade of neutrals beyond that which, quite apart from circumstances which warrant retaliation, he enjoys already under the heads of contraband, blockade, and unneutral service, would be to take away with one hand what has formally been

conceded with the other. As between belligerents, acts of retaliation are either the return of blow for blow in the course of combat, or are questions of the laws of war not immediately falling under the cognizance of a Court of Prize. Little of this subject is left to Prize Law beyond its effect on neutrals and on the rights of belligerents against neutrals, and to say that retaliation is invalid as against neutrals, except within the old limits of blockade, contraband, and unneutral service, is to reduce retaliation to a mere simulacrum, the title of an admitted right without practical application or effect.”¹

It will be recalled that the Order in Council of March, 1915, only provided for sequestration of goods removed from vessels violating its terms. We now pass to the *Leonora*, in which the validity of the Order of Council of February 16, 1917, which decreed condemnation of goods of enemy origin or destination and vessels carrying such goods when they failed to comply with its terms, was upheld. In delivering the judgment of the Privy Council in this case, Lord Sumner said :

“ Upon the validity of the Order in Council itself the appellants advanced a two-fold argument. The major proposition was that the Order purported to create an offence, namely, failure to call at a British or Allied port, which is unknown to the law of nations, and to impose punishment upon neutrals for committing it : in both respects it was said that the Order is incompetent. The minor proposition was that the belligerent’s right to take measures of retaliation, such as it is, must be limited, as against neutrals, by the condition that the exercise of that right must not inflict on neutrals an undue or disproportionate degree of inconvenience. In the present case various circumstances of inconvenience were relied on, notably the perils of crossing the North Sea to a British port of call and the fact that no particular port of call in Great Britain had been appointed for the vessel to proceed to.”²

He then stated the Court’s adhesion to the principle previously laid down in the *Stigstad* dealing with the right of retaliation, and added a further pronouncement on the general position of belligerents and neutrals :

“ There are certain rights, which a belligerent enjoys by the law of nations in virtue of belligerency, which may be enforced even against neutral subjects and to the prejudice of their perfect freedom of action, and this because without those rights maritime war would be frustrated and the appeal to the arbitrament of arms be made of none effect. Such for example are the rights of visit and search, the right of blockade and the right of preventing traffic in contraband of war. In some cases a part of the mode in which the right is exercised consists of some solemn act of proclamation on the part of the belligerent, by which notice is given to all the world of the enforcement of these rights and of the limits set to their exercise. Such is the proclamation of a blockade and the notification of a list of contraband. In these cases the belligerent Sovereign does not create a new offence *motu proprio* ; he does not, so to speak, legislate or create a new rule of law ; he elects to exercise his legal rights and puts them into execution in

¹ L.R. (1919), A.C., p. 287.

² (1919) A.C. p. 933.

accordance with the prescriptions of the existing law. Nor again in such cases does the retaliating belligerent invest a Court of Prize with a new jurisdiction or make the Court his mandatory to punish a new offence. The office of a Court of Prize is to provide a formal and regular sanction for the law of nations applicable to maritime warfare, both between belligerent and belligerent and between belligerent and neutral. Whether the law in question is brought into operation by the act of both belligerents in resorting to war, as is the case with the rules of international law as to hostilities in general, or by the assertion of a particular right arising out of a particular provocation in the course of the war on the part of one of them, it is equally the duty of a Court of Prize, by virtue of its general jurisdiction as such, to provide for the regular enforcement of that right, when lawfully asserted before it, and not to leave the enforcement to the mere jurisdiction of the sword. Disregard of a valid measure of retaliation is as against neutrals just as justiciable in a Court of Prize as is breach of blockade or the carriage of contraband of war. The jurisdiction of a Court of Prize is at least as essential in the neutral's interest as in the interest of the belligerent, and if the Court is to have power to release in the interest of the one, it must also have inherent power to condemn in justice to the other. Capture and condemnation are the prescriptive and established modes by which the law of nations as applicable to maritime warfare is enforced. Statutes and international conventions may invest the Court with other powers or prescribe other modes of enforcing the law, and the belligerent Sovereign may in the appropriate form waive part of his rights and disclaim condemnation in favour of some milder sanction, such as detention.”¹

It had been argued that the cases decided by Sir William Scott in the Napoleonic era were all cases of blockade, and that he had not pronounced on the legality of retaliation. To this Lord Sumner's reply is :

“ In their opinion Sir William Scott's doctrine consistently was that retaliation is a branch of the rights which the law of nations recognizes as belonging to belligerents, and that it is as much enforceable by Courts of Prize as is the right of blockade. They find no warrant or authority for holding that it is only enforceable by them, when it chances to be exercised under the form or the conditions of a valid blockade. When once it is established that the conduct of the enemy gave occasion for the exercise of the right of retaliation, the real question is whether the mode in which it has been exercised is such as to be invalid by reason of the burden which it imposes on neutrals, a question pre-eminently one of fact and of degree.”²

But it was further argued, neutrals must be compensated for any inconvenience caused to them, and the belligerents must make it worth their while to comply with the terms of the retaliatory order. This, said the Court, is inconsistent with the whole theory on which the right of retaliation is exercised. “ The right of retaliation is a right of the belligerent, not a concession by the neutral. It is enjoyed by law and not on sufferance ; and

¹ *Ibid.*, p. 984.

² *Ibid.*, p. 987.

doubly so when, as in the present case, the outrageous conduct of the enemy might have been treated as acts of war by all mankind.”¹

Finally, as to the peril to which neutrals were subjected by the gravity of the offences which called forth retaliation, the Court said :

“ Their Lordships recall and apply what was said in *The Stigstad*, that in estimating the burden of the retaliation account must be taken of the gravity of the original offence which provoked it, and that it is material to consider not only the burden which the neutral is called upon to bear, but the peril from which, at the price of that burden, it may be expected that belligerent retaliation will deliver him. It may be—let us pray that it may be so—that an Order of this severity may never be needed and therefore may never be justified again, for the right of retaliation is one to be sparingly exercised and to be strictly reviewed. Still the facts must be faced. Can there be a doubt that the original provocation here was as grave as any recorded in history ; that it menaced and outraged neutrals as well as belligerents ; and that neutrals had no escape from the peril, except by the successful and stringent employment of unusual measures, or by an inglorious assent to the enslavement of their trade ? Their Lordships have none.’²

I have confined myself so far to a statement of the objections raised to retaliatory measures and the reasons for legality of retaliation as laid down by the Prize Courts of Great Britain. These objections cover in the main those raised by neutral states in diplomatic notes. The French Prize Courts, so far as they were concerned with the administration of the corresponding Decree of March, 1915, were limited to questions of fact as to whether particular cargoes were or were not within the operation of the Decree. They never passed any judgment as to its conformity to the law of nations. That is in general accord with the position of Prize Courts both in France and most other European countries, where they have not the independence from executive control which characterizes in such a remarkable manner the position of the British Prize Courts.

Though the Italian Prize Courts were not concerned with the enforcement of the Anglo-French Orders and Decrees, still in one case before them they laid down principles very similar to those enunciated by the British Courts. In the case of the *Cervignano*³ the Court held that it was legitimate for belligerents to take, as a basis of their action, particular measures resorted to by their enemies, provided such actions did not violate the “imperious obligations of humanity,” and were capable of being included

¹ (1919) A.C., p. 990.

² *Ibid.*, p. 991.

³ Fauchille and Basdevant, *Jurisprudence italienne*, p. 178.

under the rules of maritime law, characterized as they were at the actual time by the supreme effort which each group of belligerents was making in order to annihilate the sea-borne commerce of the enemy and prevent him from obtaining supplies of arms and ammunition.

Reprisals ordered by the Anglo-French Orders and Decrees were directed against property and involved the detention and, under the Order in Council of February 1917, the condemnation of neutral property; but the reprisals ordered by Germany and the Central Powers were far different in their operation. The declaration of war zones around Great Britain and France and in the Mediterranean, and their enforcement by means of submarines, were stated to be by way of reprisals for British and French illegalities. In the course of the execution of their Decrees the Central Powers destroyed no less than 1,716 *neutral* ships, involving a loss of over 2,000 lives, of whom over 900 were Dutch sailors. As to the destruction of British and Allied vessels, and the lives lost thereby, Sir Samuel Evans dealt with them sufficiently for our purpose in the extract previously cited. These facts show the dangers to which neutrals were being subjected, and from which they would obtain relief if the retaliatory measures were successfully executed.

The validity of the German declaration of war zones and the indiscriminate sinking of vessels at sight did not come up for adjudication before the German Prize Courts. These courts decided that all such measures were actions of the executive government relating to operations of war, and were therefore not within their competence. Their jurisdiction only applied to acts done after the seizure of ships in prize, and if the destruction took place for any other reason, and without the vessel being seized in prize, the court was incompetent.¹ Neutral claimants were thus deprived of all means of access to the courts for the prosecution of their cases or for the examination of the legality of the acts done.

The defence of British policy, which was put forward in the diplomatic correspondence and was based chiefly on the ground that the means adopted were a legitimate extension of the law of blockade to meet novel conditions, has not been dealt with here.² The blockade argument was adverted to by Sir Samuel Evans in

¹ *The Eemland, The Gaasterland*. Verzijl, *Le droit des prises*, pp. 18, 25, 36, 708, 1046, 1262.

² See H. W. Malkin, *Blockade in modern conditions* in *The British Year Book of International Law*, 1922-23, p. 87.

his judgment in the *Leonora*, but was not adopted as the basis of the decision of the court. The position taken both by the British Government and the British Prize Courts was attacked at the time by neutral states and writers, and has since been examined by text-book writers and others who are now dealing with the history of the war. There is, I believe, a general agreement that the methods adopted by the Central Powers, even against their enemy, were illegal.

It is an accepted principle that retaliation directed solely against an enemy who violates the laws of war is, with the restrictions imposed by the laws of humanity, permissible. There are doubts as to the extent to which such reprisals may be carried. When, however, the means taken to enforce retaliation affect not only the enemy but neutrals, either directly or indirectly, there is no agreement; and it is difficult to suggest very definite lines on which one may be based. One clear rule at least may be laid down, namely, that reprisals must not violate the imperious obligations of humanity; and to this rule Anglo-French reprisals conformed. In no single case did the application of these principles involve the loss of life to either enemy noncombatant or neutral, thus differing in a striking manner from the proceedings of their adversary.

Neutral rights have been won by a long series of struggles, and though in principle they have now become generally recognized their content has varied with changed conditions. Witness the difficulties regarding the rules of contraband, continuous voyage, and blockade. The Law of Nations must from its nature have room for expansion. But if neutrals have rights, they also have duties which correspond to those rights; and while they have been insistent in season and out of season on the former, they have seldom shown the same scrupulous care in the fulfilment of the latter. Of this the conduct of Great Britain during the American Civil War may be cited as an example. Not only in time of war but in time of peace it is equally necessary to lay stress on this doctrine of state duties. States must learn that they cannot insist on the enjoyment of the liberty accorded to them under the Law of Nations unless and until their own acts are in harmony with the standard of international ethics, which is predicated by the existence of national rights.

In war this is especially the case, and if it be admitted, as I submit it must be, that a belligerent has a legal right of retaliation, it must follow that this right cannot in naval warfare be

exercised without an encroachment on certain rights which neutrals could otherwise claim. To answer illegality by illegality is obviously a procedure which is repugnant to the fundamental principles of jurisprudence, but sometimes it is unavoidable. The war of 1914 began with a flagrant act of illegality, the violation of Belgian neutrality. The injured state did all it could to resist. Great Britain, France, and Russia came to Belgium's assistance. Further illegal acts followed, involving neutral lives and property. Paper protests by neutral states were ineffective and feeble. Where one belligerent violates the sovereignty of a neutral state and the latter either cannot or will not take the necessary steps to prevent such acts of illegality, it cannot complain if the other belligerent refuses to be placed at a disadvantage by his adversary's action and does the like. Where one belligerent unlawfully interferes with neutral trade with the other belligerent, and neutral states refrain from taking the necessary means to enforce their rights, it follows that as neutral rights are based on a compromise, the compromise breaks down and the injured belligerent has left to him only the means of retaliation, which may injuriously affect neutral trade. Tacit or expressed acquiescence by neutrals in the violation of their rights, evidenced by their refraining from action tending to terminate the continuance of illegalities, is at the same time an abandonment of their neutral duties.

On this point reference may be made to the dispatch of Sir Edward Grey of April 24, 1916, to the United States, in which he dealt with the point raised by the State Department, that the Government of the United States regarded all such measures of retaliation in war as illegal if they should incidentally inflict injury upon neutrals. He said :

“ The advantage which any such principle would give to the determined law-breaker would be so great that His Majesty's Government cannot conceive that it would commend itself to the conscience of mankind. To take a simple instance, suppose that one belligerent scatters mines on the trade routes so as to impede or destroy the commerce of his enemy—an action which is illegitimate and calculated to inflict injury upon neutrals as well as upon the other belligerents—what is that belligerent to do ? Is he precluded from meeting in any way this lawless attack upon him by his enemy ? His Majesty's Government cannot think that he is not entitled by way of retaliation to scatter mines in his turn, even though in so doing he also interferes with neutral rights. Or take an even more extreme case. Suppose that a neutral failed to prevent his territory being made use of by one of the belligerents for warlike purposes, could he object to the other belligerent acting in the same way ? It would seem that the true view must be that each belligerent is entitled to insist on being allowed to meet his enemy on terms of equal liberty of action. If one of them is allowed to make

an attack upon the other regardless of neutral rights, his opponent must be allowed similar latitude in prosecuting the struggle, nor should he in that case be limited to the adoption of measures precisely identical with those of his opponent.”¹

But, it may be said, no one state can alter the law as regards other states not parties to the war without their consent. International law has given to neutral states certain rights of commerce with belligerent states, and these rights may not be interfered with except by methods known to international law, such as blockade or seizure of contraband. To this the answer appears to be that given by Lord Sumner, namely, where inconvenience is caused to neutrals and their rights are limited by retaliation, in estimating the burden imposed upon them regard must be had to the original offence which provoked the means of retaliation; and the neutral must accept as the price of deliverance from his peril the burden which he may be called upon to bear.² The belligerent is doing something for the neutral which the neutral ought to have done for himself.

But there remains a grave difficulty—that of ascertaining who is the real offender among the belligerents—who in fact first broke the law. This is not by any means always easy to ascertain, and where reprisals are decreed which would interfere with neutrals it is the neutral who has to decide this difficult question of fact. It is against the original wrongdoer whose violation of law has given the other belligerent a right of retaliation that the neutral must bring his complaint. The neutral is not allowed by the Prize Courts of Great Britain to dispute the facts giving rise to the right to retaliate. He is not allowed by the Prize Courts of Germany to call into question the retaliatory measures at all. He is therefore at a disadvantage. It may be that the employment of an international commission of inquiry to ascertain the facts on which orders for retaliation are based may be a part solution of the difficulty; but on the whole subject the chief remedy for injuries caused to neutrals by illegal acts of belligerents lies in the hands of the neutrals themselves. They must, if they demand complete exercise of their rights, undertake the duty of seeing that a belligerent does not violate the laws of war to their detriment. In the end this proved to be the real sanction for the laws of war in 1914–18. The effect of neutral opinion is the final determining factor in the maintenance of the legal and ethical standards which states have accepted for belligerent opera-

¹ *American Journal of International Law* (1916), Spec. Supp., Vol. 10, p. 137.

² See *antea*, p. 140.

tions. Non-intercourse decreed by a powerful neutral state with a law-breaking belligerent may prove a very serious sanction. If this should be insufficient there remains nothing for it but the final arbitrament of war. A belligerent, however, would have but a poor chance if he relied solely on neutrals who had been affected by his adversary's illegalities. Neutrals are slow to sacrifice the peace which they enjoy, especially when their position is one which is bringing them great material gains. When they do move their first steps are invariably diplomatic, and these are always slow. The belligerent who is the prime sufferer from breaches of the law by his enemy will undoubtedly claim the right to disregard the law and will refuse to fight with his arms tied by legal regulations. The right to retaliate has been claimed as a legal right, and should circumstances require it in the future it will in all probability again be so claimed. By the British practice, at any rate, its exercise is subject to review by the Prize Courts, which are independent of executive control ; but neutral states will best consult their own interests by becoming themselves strong and prompt defenders of International Law, and so preventing occasions from arising when an injured belligerent finds retaliation its only weapon of defence. It is in the general interests of mankind that wars should be brought to a determination as speedily as possible. Lord Grey of Fallodon, in a recently published work, says : " One lesson from the experience of the war is that we should not bind ourselves to observe any rules of war, unless those who sign them undertake to uphold them by force, if need be, against an enemy who breaks them." He communicated these ideas to Mr. Theodore Roosevelt, who, in a letter dated February 1, 1915, expressed his concurrence.¹

Fortunately, retaliation in naval wars has been rare. Attempts to regulate it by international agreement have never been made. After the lengthy examination of the subject which has been made, it may be expected that some suggestions for the future should be offered. I venture to submit the following bases for consideration:

1. Retaliation is a right of the belligerent which must be exercised only after the greatest provocation, and as a last resort.

2. Retaliatory measures must primarily be directed only against the enemy and need not be of an identical character with the wrong complained of.

3. In the exercise of retaliation the fundamental laws of humanity must be observed.

¹ *Twenty-five Years*, Vol. II, pp. 102, 143.

4. In all cases of retaliation which involve inconvenience or detriment to neutrals, Prize Courts of the belligerents should have jurisdiction both to inquire into the facts alleged as giving rise to the retaliatory measures, and also to decide whether the means adopted inflict on neutrals a degree of inconvenience in excess of that necessary to terminate the alleged illegalities.

5. Neutrals should be allowed compensation in all cases where there is undue delay in dealing with their cases in the belligerent Prize Courts under retaliatory orders, or where ship or cargo is released in consequence of an erroneous application of the order.

6. Retaliatory orders, since they are in derogation of the general rules of law, must, in case of ambiguity of language, be construed against the states issuing them.

DECISIONS, OPINIONS, AND AWARDS OF INTERNATIONAL TRIBUNALS, 1926.

JUDGMENTS AND ADVISORY OPINIONS OF THE PERMANENT COURT OF INTERNATIONAL JUSTICE.¹

JUDGMENT No. 7. DELIVERED MAY 25, 1926.

Case concerning certain German interests in Polish Upper Silesia (The Merits).

THIS was the heaviest case with which the Court has, up to the present, been called upon to deal. It occupied twelve public hearings at an extraordinary session held in February, 1926. On March 22 the Court made an Order inviting the parties to furnish further information on certain matters of fact, with which they complied by calling certain expert witnesses. These were examined and cross-examined at three further public hearings in April, this being the first occasion upon which oral evidence has been given in proceedings before the Court, and Judgment was delivered, as stated above, on May 25.

The case was instituted by an Application, filed by the German Government, based upon the Convention between Poland and Germany signed at Geneva on May 15, 1922, for regulating the division of Upper Silesia, and complaining of certain measures taken by Poland affecting German interests in that territory. The Polish Government raised a preliminary objection to the jurisdiction of the Court, which was heard at the Court's summer session in 1925 and the decision upon which is reported in last year's issue of the Year Book. As there stated, the Court upheld its jurisdiction, and the matter accordingly came up for trial on the merits. The case falls into two parts: (1) that relating to the factory at Chorzow, and (2) that relating to the large rural estates. The facts were outlined in the report alluded to above, but it may be well to recapitulate them here.

(1) In 1915 a contract was made between the German Government and the Bayerische Stickstoffwerke A.-G. whereby the company undertook to establish a nitrate factory at Chorzow in Upper Silesia. The necessary lands were to be acquired by the Reich and entered in its name in the land register. The company was to run the factory, subject to the supervision of the Government, which was entitled to share in the surplus profits. In December, 1919, a new company was formed, namely, the Oberschlesische Stickstoffwerke A.-G., to which the Reich sold the factory, i.e., the land, buildings, and installations, whilst the management remained in the hands of the Bayerische company. Accordingly, on January 29, 1920, the Oberschlesische company was entered in the Chorzow land register as owner of the land. On July 14, 1920, Poland enacted a law which provided, in effect, for the annulment of all real rights in Polish territory held by the German Reich after November 11, 1918 (the date of the Armistice) notwithstanding any

¹ The Judgments and advisory opinions of the Court and the Acts and documents relating thereto are issued by the Court in three separate series, containing respectively *Judgments* (Series A), *Advisory Opinions* (Series B), and *Acts and Documents relating to Judgments and Advisory Opinions* (Series C). The publisher is A. W. Sijthoff's Publishing Co., Leyden. (English Agents: Butterworth & Co., Bell Yard, W.C. 2)

subsequent alienation, and the substitution for the Reich of the Polish Treasury in the enjoyment of such rights. In other words, where the land register showed the Reich as owner at any time after November 11, 1918, whatever it showed at the date of the proceedings, the title was to be transferred to the Polish State. A further Article of the Law provided for the eviction of persons in occupation of the property as a result of a contract concluded with the German Government. This law purported to be based upon Article 256 of the Treaty of Versailles which provides that Powers to which German territory is ceded shall acquire all property therein belonging to the German Empire, the value thereof to be fixed by the Reparation Commission and credited to the German Government. In pursuance of this law the competent Polish Court on July 1, 1922, declared the registration of the Oberschlesische company as owner of the landed property constituting the Chorzow factory null and void, and ordered the land to be registered in the name of the Polish Treasury. On July 3, 1922, a Polish official, authorized thereto by ministerial decree, entered into possession of the factory (including the movable property, patents, &c.) and took over its management.

(2) With regard to the rural estates, the matter complained of was the issue by the Polish Government on December 30, 1924, of notice of its intention to expropriate certain large estates in Polish Upper Silesia, the proprietors of which were, according to the contention of the German Government, German nationals.

The Geneva Convention, upon the effect of which the two cases primarily depend, provides by Article 6 (which forms part of Head III) as follows :

“ Poland may expropriate in Polish Upper Silesia in conformity with the provisions of Articles 7 to 23 undertakings belonging to the category of major industries including mineral deposits and rural estates. Except as provided in these clauses, the property, rights and interests of German nationals or of companies controlled by German nationals may not be liquidated in Upper Silesia.”

Articles 7 to 23 contain detailed provisions defining the property liable to expropriation, and the procedure to be followed, including the payment of compensation by Poland to the dispossessed owners.

The judgment of the Court deals at length with the many legal points, some being of a very technical character, raised by the parties in argument. Space does not permit of their being all mentioned here ; the following report is confined to the more important questions considered by the Court.

I. CASE OF THE FACTORY AT CHORZOW.

The first submission of the German Government was that the Polish Law of July 14, 1920, constitutes a measure of liquidation within Article 6 of the Convention and consequently its application is illicit both in the case of undertakings or property not subject to expropriation under that Article, and also in the case of undertakings or property subject to expropriation, inasmuch as the provisions of Articles 7 to 22 of the Convention (including compensation to the owner) are not complied with by the Law in question.

The Polish Government objected to the Court deciding this issue by reason of the abstract character of the question. As will be observed the submission is not confined to the actual events at the Chorzow factory, but raises the question of the relation between the Law of July 14 and the Convention in general. As to this objection the Court points out that Article 14 of the Covenant gives it power

to "hear and determine any dispute of an international character which the parties thereto submit to it." Many clauses conferring compulsory jurisdiction refer to the Court differences concerning the construction and application of treaty provisions, and Article 23 of the Geneva Convention, upon which jurisdiction in the present case is founded, is a clause of this nature. This covers interpretations unconnected with concrete cases of application. There seems to be no reason why states should not be able to ask the Court to give an abstract interpretation of a treaty; rather would it appear that this is one of the most important functions which it can fulfil. It has in fact already had occasion to do so in Judgment No. 3. Article 59 of the Statute, which has been cited by Poland, does not exclude purely declaratory judgments. The object of this article is simply to prevent legal principles accepted by the Court in a particular case from being binding upon other states or in other disputes. . . . It might be asked whether a difficulty does not arise from the fact that the Court would have to deal with the Polish Law of July 14, 1920. This, however, does not appear to be the case. From the standpoint of international law and of the Court which is its organ, municipal laws are merely facts which express the will and constitute the activities of states, in the same manner as do legal decisions or administrative measures. The Court is certainly not called upon to interpret the Polish Law as such; but there is nothing to prevent the Court giving judgment on the question whether or not, in applying that law, Poland is acting in conformity towards Germany under the Geneva Convention.

Upon the merits of this issue, the Court points out that the Geneva Convention includes three headings, the first of which is intended to secure for a certain time and under certain reservations the maintenance in force of German law in the Polish portion of the plebiscite area; the second secures the protection of vested rights, and the third establishes Poland's right to expropriate in Polish Upper Silesia certain property of German nationals or of companies controlled by them under certain conditions. Whereas the second head is general and confirms the obligation of Germany and Poland in their respective portions of Upper Silesia to recognize and respect rights of every kind acquired before the transfer of sovereignty, Head III only refers to Polish Upper Silesia and establishes in favour of Poland a right of expropriation which constitutes an exception to the general principle of respect for private rights. The word "liquidation" only occurs in the second part of Article 6; everywhere else in Head III of the Convention the word used is "expropriation." Having regard to the context it is reasonable to suppose that the intention was, bearing in mind the régime of liquidation instituted by the peace treaties, to convey the meaning that, subject to the provisions authorizing expropriation, the treatment accorded to German private property is to be that recognized by the generally accepted principles of international law. In any event, it is certain that expropriation is only lawful in the cases and under the conditions provided for in Article 7 and the following articles; apart from these cases, or if these conditions are absent, expropriation is unlawful.

"There can be no doubt that the expropriation allowed under Head III of the Convention is a derogation from the rules generally applied in regard to the treatment of foreigners and the principle of respect for vested rights. As this derogation itself is strictly in the nature of an exception it is permissible to conclude that no further derogation is allowed. Any measure affecting the property, rights and interests of German subjects covered under Head III of the Convention, which is not justified on special grounds taking precedence over the Conven-

tion, and which oversteps the limits set by the generally accepted principles of international law, is therefore incompatible with the régime established by the Convention. The legal designation applied by one or other of the interested parties to the act in dispute is irrelevant if the measure in fact affects German nationals in a manner contrary to the principles enumerated above. It follows from these same principles that the only measures prohibited are those which generally accepted international law does not sanction in respect of foreigners ; expropriation for reasons of public utility, judicial liquidation, and similar measures are not affected by the Convention."

The Court then proceeds to examine the provisions of the Polish Law of July 14, 1920, and holds that, apart from the points about to be mentioned, its application in Upper Silesia is incompatible with the system established under Head III of the Geneva Convention. The points in question were the following : The Polish Government contended that the Law of July 14 had no connexion with Head III because in the first place that Law merely gave effect to rights which Poland derived from the Treaty of Versailles and other international instruments, and secondly, even supposing this was not the case, the measures taken in application of the Law cannot be regarded as measures of liquidation within the meaning of Article 6 of the Convention.

The first of these points depends upon the terms of Armistice laid down on Nov. 11, 1918, and in the Protocol of Spa on Dec. 1, 1918, which prohibit certain categories of acts by the German Government during the Armistice period, tending to diminish Germany's capacity to pay reparations. Article 256 of the Treaty of Versailles provides for the acquisition by the states succeeding Germany in ceded territory of the latter's public property ; and the Polish Government contended that all alienations by the German Government subsequent to Nov. 11, 1918, were void and the property so dealt with Poland's as of right under Article 256. The Court points out that Poland was not a party to either of the Armistice agreements. Therefore she cannot rely upon them. "A treaty only creates law as between the states which are parties to it ; in case of doubt, no rights can be deduced from it in favour of third states." Germany retained the right to dispose of her property until the actual transfer of territory and only a misuse of this right could endow an act of alienation with the character of a breach of Article 256 ; such misuse cannot be presumed and it rests with the party alleging it to prove it.

As to the second point, the Polish argument was that the Law of July 14, 1920, is based on considerations foreign to the conception of liquidation : it applies to certain property without regard to the nationality of the possessor, whereas the régime of liquidation only applies to German private property as such. In regard to this the Court observes that "expropriation without indemnity is certainly contrary to Head III of the Convention ; as a measure prohibited by the Convention cannot become lawful under this instrument by reason of the fact that the state applies it to its own nationals."

The Court therefore decided that the application in Upper Silesia of the Law of July 14, 1920, in so far as it affects German nationals or companies controlled by them covered by Head III of the Geneva Convention, is contrary to Articles 6-22 of that Convention.

The second submission of the German Government was confined to the particular case of the Chorzow factory, and was stated as follows : (a) That the atti-

tude of the Polish Government in regard to the Oberschlesische and Bayerische companies was not in conformity with Article 6 and the following articles of the Geneva Convention. (b) Should the decision in regard to (a) be in the affirmative the Court is requested to state what attitude should have been adopted by the Polish Government in regard to the companies in question in order to conform with the above-mentioned provisions.

In regard to (b) the Court recalls the fact that in its judgment on the preliminary objection (Judgment No. 6) it had over-ruled Poland's contention that this part of the application was in itself inadmissible because it amounted in effect to a request for an advisory opinion. In proceeding thus, however, the Court supposed that Germany would, in her Case on the merits, formulate properly set out claims in regard to this point. But the anticipated data were not furnished and the point remained in its purely interrogative form. "In these circumstances, the Court is not in a position to give judgment on this submission; for though it can construe the submissions of the parties, it cannot substitute itself for them and formulate new submissions simply on the basis of arguments and facts advanced." The Court therefore deals only with submission (a).

As to this the Court observes that, having regard to its decision on the first German submission, the question *prima facie* resolves itself into this: whether the Oberschlesische and Bayerische (both of which were admittedly companies controlled by German nationals) are really the owners of the rights which together constitute the Chorzow enterprise. The only other point to be considered is whether the transfer of the property by the Reich to the Oberschlesische was fraudulent or a misuse of its rights of alienation. The Court after examining the facts answers the first question in the affirmative and the second in the negative, and accordingly decides that the attitude of the Polish Government in regard to the two companies was not in conformity with the relevant articles of the Geneva Convention.

II. CASE OF THE LARGE RURAL ESTATES.

The German submission upon this part of the matter was, in its final form, framed as follows: "That the notices of an intention to liquidate the rural estates belonging to" 10 named persons and bodies "are not in conformity with the provisions of Article 6 and the following articles of the Geneva Convention."

Article 6: This has already been cited.

Article 9, paragraph 3, sub-paragraph 2: "Rural estates which are devoted principally to serving the needs of large industrial undertakings (dairy-farming estates, timber-raising estates, &c.) shall be considered, for the purposes of this article, as forming part of the undertakings the requirements of which they may serve."

Article 12, paragraph 1: "Poland may expropriate estates of not less than 100 hectares of agricultural land (hereinafter called large estates) belonging . . . to German nationals who are not entitled to retain their domicile in Polish Upper Silesia (Articles 40 and 42) or to companies controlled by such German nationals." Then follows a limitation on the total area liable to expropriation.

Article 13, paragraph 2: "Agricultural estates which, in accordance with Article 9, paragraph 3, sub-paragraph 2, are to be regarded as forming part of undertakings belonging to the category of major industries, shall not be included for the purposes of the calculation of the total area of estates liable to expro-

priation, and the provisions regarding the expropriation of rural property shall not be applicable to them."

Article 15, paragraph 1, sub-paragraph 1 : " Should the Polish Government desire to expropriate a large estate, it must give notice of its intention to the owner of the estate before January 1, 1925."

Following upon the conclusions reached in the judgment on the preliminary question it was agreed by the parties that the Court should decide not only whether the notices were regular in form but also and above all whether they had been served in respect of estates liable to expropriation under these provisions. In other words, the issue in effect was whether the estates in question were or were not so liable.

In order to understand the position, it should be mentioned that Article 7 of the Convention stipulates that for a period of 15 years major industries can only be expropriated if the Mixed Commission certifies that such a measure is indispensable to assure the maintenance of exploitation, a condition which does not apply in the case of independent agricultural estates.

The estates covered by the notices in question were in some cases exclusively agricultural in character and use and in other cases estates which, in the contention of the German Government, were principally devoted to serving the needs of industrial enterprises. As regards the latter category Article 9, paragraph 3, sub-paragraph 2 set out above is the applicable provision and the Court therefore proceeded to consider its interpretation generally. The judgment states that the object of this provision is to maintain industrial enterprises in their entirety and to their full capacity. That is why estates of this nature are expropriable as part of the industry which they serve, and unexpropriable under Article 12. In determining whether an estate is " principally intended to meet the requirements of undertakings belonging to the group of major industries " the essential factor is the purpose to which they are devoted, i.e., a situation of fact established by the will of man. The subserviency of the estate to the undertaking must be genuine and reasonable, but it need not be in the nature of a necessity. The purpose must be the *principal* purpose served by the estate, but not necessarily its only purpose. The Polish Government urged the Court to adopt a narrow interpretation of the relation required by Article 9, and controversy arose between the parties, particularly over the question of subsidence. The German Government maintained that where mine-owners have secured possession of the surface of the soil in order to protect themselves from the economic consequences of subsidence, this constitutes a devotion of the surface to the needs of the mining industry. The Polish Government, on the other hand, argued that ownership of the surface is not nowadays absolutely necessary because modern technical knowledge has introduced processes which enable damage to the surface to be avoided, and consequently that estates held for the purpose of preventing subsidence were not within the article. Expert witnesses were called on this subject, but the Court refrains from deciding whether the methods alluded to by the Polish Government can in fact wholly prevent subsidence, and holds that the possession of the surface for the purpose of preventing subsidence is sufficiently related to and important for the mining enterprise to bring estates so held within the article.

The judgment then turns to the individual cases and examines in detail the facts of each for the purpose of ascertaining and deciding the character of the estate, and also, where this was disputed, the nationality and domicile of the owner.

Only two or three points seem to be of sufficient general interest to call for mention here. In one case the owner of the estate was a company having its registered office in Berlin, but the majority of the shares in which were held by persons not of German nationality. The Court decided that having regard to the criterion adopted by the Geneva Convention in the case of companies, namely, that of control, the company in question could not be regarded as coming within Article 12. On the other hand, the Court held that the City of Ratibor, a Prussian commune, was a "German national" within that article. In two of the cases, a curious question arose as to domicile. The estates were in each instance cut in two by the new frontier between Germany and Poland in Upper Silesia, and the owners, being admittedly German nationals, claimed to be domiciled in Polish Upper Silesia, and therefore exempt from expropriation. The house in which they lived was on the German part of the estate. The German Government contended that domicile should be regarded as existing on the whole of the estate, but the Court declined to accede to this view. The judgment states that "the characteristic feature of domicile is the fact that from the point of view of law a person is attached to a particular locality. This locality is normally the home, the house, inhabited by the person concerned. If the whole extent of an estate could be regarded as a domicile, the precise localization of the legal rights and obligations of a person, which is the most essential feature of domicile, would be lacking. It is possible to have more than one domicile, but it is out of the question that the same domicile should be in two different localities, in two communes, or even in two different states."

In the result the Court decided that five of the notices were contrary to the Convention; three claims were dismissed; one partly upheld and partly dismissed; and in one case a decision became unnecessary by reason of the action of the Polish Government in the course of the proceedings.

The judgment was concurred in by all the members of the Court except the Polish national judge, who delivered a dissenting opinion. Lord Finlay, whilst agreeing with the Court's conclusions, added some observations bearing upon the effect of the Armistice agreements. He expresses the view that Poland is entitled to the benefit of the Armistice, because it was common knowledge that, if the Allies succeeded, the independence of Poland would be one of the terms of peace, and it must have been intended that Poland should be bound by the terms of Armistice and, when she came into existence as a recognized state, have the benefit of them. Just as a contract on behalf of a company not yet incorporated takes effect upon incorporation, the Allied states made the Armistice on behalf of Poland, which was about to become a state, as well as on their own behalf. But the relevant provision of the Protocol of Spa cannot be invoked by Poland because it only relates to measures diminishing the Allies' security for the payment of reparations.

ADVISORY OPINION No. 13. DELIVERED JULY 23, 1926

Competence of the International Labour Organization to regulate, incidentally, the personal work of the employer.

This opinion, the third relating to international Labour questions, was delivered in consequence of a reference by the Council of the League acting at the instance of the Governing Body of the International Labour Organization. The resolution of the Council, adopted on March 17, 1926, recites a resolution of the Governing Body in the following terms : " The Governing Body of the International Labour Organization having before it a request of the employers' group for the submission to the Permanent Court of International Justice of the question of the jurisdiction of the International Labour Organization in regard to the personal work of the employer, decides, although the majority considers that the International Labour Organization is competent in the matter to which the request refers, and declaring that the present decision shall not constitute a precedent, to transmit the request to the Council of the League of Nations in application of Article 14 of the Treaty of Peace, and to state the question to be referred to the Court as follows :

" ' Is it within the competence of the International Labour Organization to draw up and to propose labour legislation which, in order to protect certain classes of workers, also regulates incidentally the same work when performed by the employer himself ? ' "

The Council's resolution proceeds to request the Court to give an advisory opinion on this question.

The Court in accordance with its rules gave notice of the request to the Members of the League and the states mentioned in the Annex to the Covenant, and also to various international organizations. A number of documents were put in, and oral statements were heard by the Court at public sittings in June, 1926, by representatives of the International Labour Organization and other international organizations.

The Court points out in its opinion, that the matter originated at the 6th Session of the International Labour Conference held in 1924 when the subject of " Night work in Bakeries " was discussed, and a Draft Convention dealing therewith adopted by a preliminary vote. This Draft Convention contained the following provision :

" Subject to the exceptions hereinafter provided, the making of bread, pastry or other flour confectionery during the night is forbidden.

" This prohibition applies to the work of all persons, including proprietors as well as workers, engaged in the making of such products ; but it does not apply to work which is done by members of the same family for their own consumption."

At the next session of the Conference the Draft Convention was finally adopted, notwithstanding the determined opposition of the employers' group, who challenged the legality of the extension of the prohibition against night work to the personal work of the employer.

Turning to the question submitted to it, the Court observes that it does not relate to any particular branch of industry, but is general in its scope. Therefore the Court has not considered specifically the conditions of the baking industry,

and no conclusion as to what kind of legislation such conditions justify can be drawn from the answer given by the Court to the question before it. Further it is clear from the terms of the request that the Court is not called upon to deal with the work of the employer in general, but only in so far as such work is the same as that of the worker and as its regulation is *incidental* to a regulation proposed in order to protect certain classes of workers and to assure such protection. The International Labour Organization has not claimed any general power to regulate work done by the employer, and, by the very terms of the question, this phase of the subject has been deliberately excluded from the consideration of the Court.

The question (proceeds the opinion) is one of law, the answer to which depends upon the terms of Part XIII of the Treaty of Versailles. The Court therefore examines these provisions, and comes to the conclusion that the competence of the International Labour Organization, so far as concerns the investigation and discussion of labour questions and the formulation of proposals, is exceedingly broad. It points out, however, that the Organization is almost wholly confined to that auxiliary form of activity. It has no legislative power. Each Member is free to adopt or to reject any proposal of the Organization either for a national law or an international Convention.

The High Contracting Powers clearly intended to give to the International Labour Organization a very broad power of co-operating with them in respect of measures to be taken in order to assure humane conditions of labour and the protection of workers. It is not conceivable that they intended to prevent the Organization from drawing up and proposing measures essential to the accomplishment of that end. The Organization, however, would be so prevented if it were incompetent to propose for the protection of wage-earners a regulative measure to the efficacious working of which it was found essential to include to some extent work done by the employer.

Moreover, there are specific provisions of the Treaty, in the application of which, as they are generally understood, the incidental regulation of the personal work of the employers is potentially involved; e.g. regulation of the hours of work; the adoption of a weekly rest day. Further, the past practice of the International Labour Organization confirms this view, as witness the proposals relating to the use of white phosphorus in the manufacture of matches, and white lead in painting.

The Court observes that in the course of the arguments a wide range of topics including national sovereignty, individual liberty, and various controversial theories of society and government were discussed. These may well have been considered by those who framed and adopted Part XIII of the Treaty. But the province of the Court is to ascertain what it was the Contracting Powers actually agreed to. The Court, in interpreting Part XIII, is called upon to perform a judicial function and, taking the question actually before it in connexion with the terms of the Treaty, there is no room for the discussion and application of political principles or social theories, of which, it may be observed, no mention is made in the Treaty.

Finally, the Court states that controversy may, of course, arise at different stages of the procedure of the International Labour Organization as to whether a specific proposal for regulating the personal work of the employer would be primary rather than "incidental." This involves the exercise of judgment by

the proper authorities on the circumstances of each case as it arises and the Court expressly refrains from indicating the limits of any discretionary powers which the International Labour Organization may possess as regards the making of incidental regulations.

In the result the question was answered unanimously in the affirmative.

ALEXANDER P. FACHIRI.

ARBITRATION BETWEEN THE REPARATION COMMISSION AND THE
GOVERNMENT OF THE UNITED STATES OF AMERICA UNDER
THE AGREEMENT OF JUNE 7, 1920

AWARD

WHEREAS

It is fitting, before examining the question in any way, to recall the following facts and documents :

By paragraph 1 of Annex III to Part VIII of the Treaty of Versailles, the German Government, "on behalf of themselves and so as to bind all other persons interested, ceded to the Allied and Associated Governments," represented for the purpose by the Reparation Commission, "the property in all the German merchant ships which are of 1,600 tons gross and upwards."

The third paragraph of the same Annex lays down that "the ships and boats mentioned in paragraph 1 include all ships and boats which (a) fly, or may be entitled to fly, the German merchant flag ; or (b) are owned by any German national company or corporation."

In execution of the above provisions, the German Government delivered to the Reparation Commission nine tankers (*Helios*, *Mannheim*, *Sirius*, *Niobe*, *Pawnee*, *Hera*, *Loki*, *Wotan*, and *Wilhelm Riedemann*) which belonged to a company having its registered office at Hamburg and known as the Deutsche Amerikanische Petroleum Gesellschaft, hereinafter referred to as the D.A.P.G.

There was no doubt that, from the point of view of the German Government, the ships in question came under Annex III, seeing that they flew the German merchant flag and also belonged to a company which was indisputably German.

It must be pointed out at once that, subsequently, one of these vessels, the *Wilhelm A. Riedemann*, was recognized as not deliverable as a vessel under construction under Annex III and that three others, the *Helios*, *Mannheim*, and *Sirius*, were sold by agreement between the parties.

The present arbitration is concerned with the tankers *Niobe*, *Pawnee*, *Hera*, *Loki*, and *Wotan*, with the proceeds from their working and with the proceeds from the sale of the tankers *Helios*, *Mannheim*, and *Sirius*.

In March, 1919, and subsequently, through the intermediary of the American Delegations to the Peace Conference and to the Reparation Commission, the American "Standard Oil Company" of the State of New Jersey protested against the delivery to the Powers of the vessels in question, of which it claimed the ownership.

In support of this claim, the Standard Oil Company relied upon the fact that the D.A.P.G. had been created by it, with the help of capital supplied by it and employed for the construction of the vessels claimed. It explained that the capital of the D.A.P.G. was 60 million marks, divided into 9 million shares, 21 million

share-warrants and 80 million debentures. It alleged that at the time of the coming into force of the Treaty of Versailles it owned of this capital the whole of the shares and almost all the share-warrants and debentures, except for an infinitesimal part.

It concluded that it had a right of ownership in the disputed vessels of a special kind known as "beneficial ownership," which made it impossible to say that they were the property of German nationals in the meaning of Annex III.

It further invoked considerations of equity which, in its opinion, justified the return of these vessels.

As the Governments of the Principal Allied Powers represented on the Reparation Commission did not see fit to allow the claim of the Standard Oil Company, a convention was concluded, after many discussions which will be mentioned later, on June 7, 1920, between the Reparation Commission, represented by M. Dubois and Sir John Bradbury, and the United States Government, represented by Mr. Boyden.

Under this convention the disputed tankers were temporarily handed over to the Government of the United States of America on the understanding that they were to fly both the flag of that country and the interallied flag.

In order to settle the dispute, Article 1 of this Convention provided for the constitution of an independent tribunal in the following form :

Paragraph 1 : " If the United States has not on July 1, 1920, ratified the Peace Treaty and an American representative is not qualified and acting on the Commission, then the Standard Oil Company's claim shall, at the request of the United States or other interested Governments, be adjudicated by an independent tribunal to be agreed upon between the United States and the several Governments concerned so that all parties interested may be properly heard. The Reparation Commission and the United States pledge themselves to use their best efforts to arrange this tribunal without delay."

The problems to be submitted to this Tribunal were formulated as follows in Paragraphs F and G :

Paragraph F : " As soon as the Reparation Commission or Independent Tribunal mentioned in paragraph 1 has declared its decision upon the claim of the Standard Oil Company, the United States will transfer tankers in accordance with such decision, it being agreed, however, that if Standard Oil Company makes good its claim to beneficial ownership of all or any of the tankers in question, then such tankers shall by the terms of the decision be awarded to that Company and transferred to the United States flag."

Paragraph G : " If Standard Oil Company fails to make good its claim to beneficial ownership of tankers, but is found to be entitled to financial reimbursement, then Standard Oil Company shall be entitled to liquidation of the award by transfer of tankers to a value equal to the award, the tankers to be valued by the Reparation Commission or Independent Tribunal in its award, and the particular tanker or tankers to be selected by the Standard Oil Company and accepted by the Company at the valuation aforesaid."

By a decision of October 14, 1921, the Reparation Commission proceeded, with the approval of the American Unofficial Delegate, to set up the Tribunal provided for in paragraph 1 of the said Agreement. It appointed as Arbitrators : Colonel Hugh A. Bayne, Attorney at the Supreme Court of the United States, and M. Jacques Lyon, Avocat à la Cour d'Appel de Paris. Moreover, it was

provided by this decision that in the event of disagreement between them a third Arbitrator previously appointed for the purpose would become a member of the Tribunal and the decision of the majority of the members of the Tribunal thus constituted would be final.

The two Arbitrators appointed by the Decision of October 14, 1921, received the memorials and heard the observations of the parties concerned, but, as they were unable to come to an agreement and had previously obtained a promise of co-operation from M. Erik Sjoeborg, former Sectional President of the Franco-German Mixed Arbitral Tribunal and Envoy Extraordinary and Minister Plenipotentiary of the King of Sweden, they requested the latter to join them on the Tribunal.

The Tribunal thus constituted proceeded to a further examination of the question. All the documents were submitted to the new arbitrator for examination.

M. Lyon and Colonel Bayne, acting respectively on behalf of the Reparation Commission and the American Government, waived any further hearing and the parties confined themselves to adding a short written Note to their previous memorials, the arguments and conclusions of which they maintained.

Thus after various meetings in Paris for deliberation, MM. Sjoeborg and Lyon formulated the majority decision, the text of which is given below, to which Colonel Bayne appended a minority opinion.

MAJORITY DECISION OF MM. SJOEBORG AND LYON

The Sale of the Shares in February, 1917.

Whereas, in support of its claims, the Standard Oil Company asserts that at the time to which it is necessary to go back to determine the validity of these claims, that is, January 10, 1920, the date of coming into force of the Treaty of Versailles, it was owner of all the shares and almost all the other securities of the D.A.P.G. ;

Whereas the Reparation Commission objects that at a date previous to that time the Standard Oil Company had sold all these shares ;

Whereas, in fact, it is indubitable that in February, 1917, when America's declaration of war was imminent, the Standard Oil Company, desiring to save its shares from confiscation by the German Government, sold all its voting shares to a German national, Herr Riedemann ; and whereas, the price not having to be paid until a later date, the purchaser made over to the Standard Oil Company as partial guarantee some securities which he held in the United States ;

Whereas, however, it is necessary to examine the juridical effects of this sale ;

Whereas the above-mentioned securities made over by Riedemann to the Standard Oil Company were seized as enemy property by the Alien Property Custodian, the latter, when opposition was lodged by the Standard Oil Company, asserted his belief in the good faith of the sale, but none the less, by a decision of February 6, 1919, declared it to be null and void ;

Whereas this decision, being prompted only by reasons of public order, could not lead the Tribunal to consider the sale as null ;

Whereas, in order to determine the validity of the latter, it is necessary to refer to German law ;

Whereas this contract was concluded in Germany ; whereas it is necessary in

this connexion to note that in reply to a cable of February 5, 1917, in which, after formulating his offer of purchase, Herr Riedemann added : " Purchase to be perfect on receipt of your confirmation," the Standard Oil Company replied the same day : " Terms stated accepted and sale confirmed " ;

Whereas, moreover, in this case, it was a question of the sale of the shares of a German company, and under the contract the shares sold were, in accordance with the express intention of the parties, to be transferred on the books of the company to their new owner ;

Whereas in order to understand the effect of such a sale in German law, two legal opinions were submitted to the Tribunal, the one emanating from Professor Riese of the University of Berlin, communicated by the Managing Board of the Standard Oil Company, and the other from Herr Max Bonnem, Advocate at the Court of Berlin, directly consulted by M. Lyon and Colonel Bayne ;

Whereas it appears from these opinions that, since the shares in question are registered shares, German law, which is strictly formalistic on this point, considers their sale as perfect only as and when the securities representing the shares have been the subject of a material transfer from the seller to the purchaser ;

Whereas it is not denied that the certificates issued by the D.A.P.G. representing shares which formed the subject of the convention of February, 1917, never left the Head Office of the Standard Oil Company in the United States ;

Whereas, therefore, failing their handing over to the purchaser, the sale in question must be considered, in German law, as never having been put into execution ;

Whereas it is consequently certain that at the time of the coming into force of the Treaty of Versailles the Standard Oil Company was still owner of the whole of the shares, as well as of almost all the other securities of the D.A.P.G. ;

Whereas, this point being established, it is necessary to consider successively the problems arising for the Tribunal out of Paragraphs F and G of the Agreement of June, 1920 ;

Paragraph F.

Whereas, under this Paragraph, it is for the Tribunal to decide whether the Standard Oil Company has made good its claim to the " beneficial ownership " of all or any of the tankers ;

Whereas, at the outset, a question of interpretation of the terms of reference arises ;

Whereas this question is : whether the proof of the ownership by the Standard Oil Company on January 10, 1920, of all or nearly all the various categories of securities issued by the D.A.P.G. is the sole and only condition of its alleged right to the " beneficial ownership " of the tankers, or whether this right does not involve a factor in addition to the right of ownership of the securities, the nature of which factor it is for the Tribunal to determine ;

Whereas, in other words, it has to be ascertained whether the previous finding of the right of ownership of the Standard Oil Company in the securities of the D.A.P.G. ends the task of the Tribunal, or whether it is only the point of departure necessary, but in itself insufficient ;

Whereas the Tribunal cannot find that the Agreement of June 7, 1920, may be interpreted to mean that the ownership of the securities of the D.A.P.G. would

suffice to confer upon the Standard Oil Company the "beneficial ownership" of the tankers ;

Whereas, in the first place, such an interpretation is belied by the preparatory reports of the said Agreement, especially paragraphs F and G, as communicated to the Tribunal by Colonel Bayne ;

Whereas the Reparation Commission had entrusted the drafting of these two articles to Sir John Bradbury and Mr. Boyden, representing respectively Great Britain and the United States on the Reparation Commission ;

Whereas in a telegram sent on May 19, 1920, to the State Department, Mr. Boyden summarized as follows the attitude of Sir John Bradbury with regard to the American proposal for the drafting of Paragraph F :

"He has no objection to Standard Oil Company making any claim of any kind before Tribunal. His objection is to instructing Tribunal that proposal ownership of securities shall *necessarily* lead to any particular result. He wishes whole matter to be determined by Tribunal. If your language 'claim of beneficial ownership' means beneficial ownership in tankers themselves, he would accept your idea. It would then be possible for Tribunal to consider whether ownership of securities as proved did or did not constitute beneficial ownership of the tankers, but if your language means, as he thinks, that ownership of securities *necessarily* determines the question of beneficial ownership, then he is unwilling to accept your suggestion" ;

Whereas it further appears from this same cable that Sir John Bradbury, not accepting the American suggestion concerning the drafting of Paragraph F, proposed another wording for this paragraph, namely that which was afterwards inserted in the Agreement ;

Whereas in a Note of May 20, 1920, transmitted to Mr. Boyden, Sir John Bradbury, who drafted it, declared : "If the Reparation Commission rightly understands the contention of the United States Government, it is that the vessels in question are substantially the property of United States citizens by reason of the fact that an American Company is the proprietor of practically the whole of the securities of the German Company to which they belong" ;

Whereas it follows from the facts set forth above that prior to the signing of the Agreement of June 7, 1920, the Reparation Commission, through its spokesman Sir John Bradbury, had clearly stated to Mr. Boyden, representing the American Government, that in its opinion Article F, as it stood, could not be interpreted to mean that the problem submitted to the Tribunal was limited to examining the right of ownership of the Standard Oil Company in the securities of the D.A.P.G. ;

Whereas, moreover, and independently even of the conclusion to which the preliminary reports necessarily lead, if the Parties concerned had meant to submit to the Tribunal only the problem of the ownership of the securities, they would certainly not have failed to say so expressly and would not have concealed this problem, which it would have been easy to state, under cover of the "claim to beneficial ownership" ;

Whereas, moreover, it would be difficult, if the Agreement of June 7, 1920, had been interpreted by the Standard Oil Company as limiting the task of the Tribunal, to explain why the introductory memorial of this company, signed by three eminent Counsel, was almost entirely devoted to discussing the juridical rights of the shareholders in the corporate assets ;

Whereas, finally, such an interpretation of Paragraph F seems to render Paragraph G unnecessary ; for either the Standard Oil Company, making good its right of ownership in all or part of the securities, thereby establishes directly, from this very fact, its right of ownership in all or part of the disputed vessels, or else, the Standard Oil Company having failed to get itself recognized owner of the securities, it is difficult to understand on what basis an indemnity could be awarded to it under Paragraph G ;

Whereas, since the Tribunal concluded on this point that if the problem of " beneficial ownership " could only arise in so far as the Standard Oil Company had previously established its right of ownership in the securities of the D.A.P.G., the two problems remain distinct, and " beneficial ownership " is only conceivable in the form of a special kind of right, distinct from the right of ownership of the securities and additional to it ;

Whereas it is consequently necessary to ascertain what this right may be from the definition given of it by the Standard Oil Company, to whom it falls to make good its claim to " beneficial ownership " ;

Whereas, indeed, the two memorials submitted to the Tribunal in the name of the Standard Oil Company, that of Mr. John B. Moore of December 31, 1921, and that of Mr. Piesse of August 31, 1923, furnish a twofold definition of this expression ;

A.

(a) Whereas the first definition appears in Nos. 16 and 17 of the " *De facto and de jure* Summary " at the close of the first memorial (p. 114), as follows :

16. " The right of beneficial ownership, derived from the substantial, i.e. the lucrative or economic, interest is universally recognised. This right, although subject to the agreed conditions of legal control, *reaches the property itself* and comprises the right to the continued present enjoyment and ultimate possession."

17. " The right of beneficial ownership is most frequently assured through corporate organisation, in which individuals unite their resources for purposes of business, and while the control and use of the property are subject to the terms of the corporate agreement, yet the contributing individuals, as the ultimate owners of the assets, have in the capital and business *a distinct and positive right of property which the law recognises and protects*. This right, no matter by what form of security it is evidenced, is recognised under all legal systems."

Whereas the argument of the Standard Oil Company is perfectly unambiguous since it lays down very clearly that in its view the shareholder in a company has in the assets of that company " a distinct and positive right of property which the law protects," a right *sui generis* known as " beneficial ownership " which is essentially a right which " reaches the property " ;

Whereas the existence of such a right can be affirmed by the Tribunal only in so far as it could be proved that this right has been recognized by doctrine and sanctioned by jurisprudence ;

(b) Whereas indeed the memorials of the Standard Oil Company quote passages from authors and appeal to the works of doctrinal authorities ;

Whereas, however interesting these opinions may be from the theoretical point of view and for the effect they may possibly have on future jurisprudence, the Tribunal must remark that up to the present they have encountered the opposition of most doctrine and nearly all jurisprudence, which in all countries

accord to the legal entity known as a company a personality and a patrimony entirely distinct from those of its shareholders ;

Whereas in fact the decisions of principle of the highest courts of most countries continue to hold that neither the shareholders nor their creditors have any right to the corporate assets other than to receive, during the existence of the company, a share of the profits, the distribution of which has been decided by a majority of the shareholders, and, after its winding up, a proportional share of the assets ;

Whereas it is sufficient in this connection to quote, in so far as concerns the United States, the case of *Eisner v. Macomber* (1919-252 U.S. 189), in which, the point being to determine whether stock dividend should be considered to be dividend which as such became the property of the shareholders or to be capital which remained the property of the company, in this case the Standard Oil Company of California, the Supreme Court of the United States declared that : “ The stock holder’s interest pertains not to any part, divisible or indivisible, but to the entire assets, business, and affairs of the company. Nor is it the interest of an owner in the assets themselves, since the corporation has the full title, legal and equitable, to the whole ” ;

Whereas this decision must be compared with the decision of the New York State Appellate Court in the case of *Riggs v. Insurance Co.* (123, N.Y. 7 1890), in which, replying in the affirmative to the question as to whether a shareholder as such had the right to insure certain corporate property, the Court declared : “ It seems to us, both upon authority and reason, that the insurance now in question is a fair and reasonable contract of indemnity founded upon a real interest, though not amounting to an estate, legal or equitable, in the property insured ” ;

Whereas numerous similar decisions have been rendered by the British courts, and whereas it will be sufficient to quote in this connection the following decisions which have established a precedent :

Bulmer v. Norris (1860, 9 C.B. N.S. 19), in which it was decided that the shareholder in a joint stock company had no legal or equitable interest in lands belonging to the company, his interest being limited to a proportional share in the profits of the company ;

R. v. Arnaud (1846, 9. Q.B. 806), in which Lord Denman, deciding the case of a limited liability company which was the owner of a vessel, declared that “ the corporation is, as such, the sole owner of the ship, and individual members of the corporation are not entitled, in whole or in part, directly or indirectly, to be owners of the vessel ” ;

Gramophone Co. Ltd. v. Stanley (1908, 2. K.B. 89), in which Lord Cozens Hardy declared : “ The fact that an individual by himself or his nominees holds practically all the shares in a company may give him the control of the company in the sense that it may enable him by exercising his voting powers to turn out the directors and to enforce his own views as to the policy, but it does not in any way diminish the rights and powers of the directors or make the property and assets his, as distinct from the corporation’s. Nor does it make any difference if he acquires not practically the whole but absolutely the whole of the shares. The business of the company does not thereby become his business. He is still entitled to receive dividends on his shares but no more ” ;

Whereas a decision of the House of Lords of April 3, 1925 (*Macaura v. Northern Assurance Company Ltd.*) (Times Law Reports, May 8, 1925, page 447), sum-

ming up and confirming all this jurisprudence, declared null and void a contract insuring a stock of building timber belonging to a company, concluded by a person who was at the same time the owner of all the shares of the company and by far its most important creditor ;

Whereas in support of this conclusion it is pertinent to quote the following passages by Lords Buckmaster, Sumner and Wrenbury :

Lord Buckmaster : “ Turning now to his position as shareholder, this must be independent of the extent of his share interest. If he were entitled to insure holding all the shares in the company, each shareholder would be equally entitled, if the shares were all in separate hands. Now no shareholder has any right to any item of property owned by the company, for he has no legal or equitable interest therein. He is entitled to a share in the profits while the company continues to carry on business and a share in the distribution of the surplus assets when the company is wound up ” ;

Lord Sumner : “ He stood in no legal or equitable relation to the timber at all. He had no concern in the subject insured. His relation was to the company, not to its goods, and after the fire he was directly prejudiced by the paucity of the company’s assets, not by the fire ” ;

Lord Wrenbury : “ This appeal may be disposed of by saying that the corporation, even if he holds all the shares, is not the corporation and that neither he nor any member of the company has any property, legal or equitable, in the assets of the corporation ” ;

Whereas, in so far as concerns French jurisprudence, it will be sufficient to quote Professor Thalier, who is one of the most eminent opponents of the classic theory of the personality of companies, but who adds, on page 189 of the 1916 edition of his “ *Traité élémentaire de droit commercial* ” : “ Jurisprudence has immutable faith in it and does not seem even to suspect the existence of the other constructions which doctrine advances in opposition ” ;

(c) Whereas the memorials of the Standard Oil Company rely also on various legal or administrative decisions on the seizure of ships or the sequestration of property belonging to companies during the war, according to which courts and administrations of the belligerent countries admitted that the nationality and personality of a company could not constitute an obstacle to a seizure or a sequestration if it could be proved that the company was “ controlled ” by enemy subjects ;

Whereas however the decisions and circulars relied on have avoided placing themselves in direct opposition to the classic theory and the established doctrine ; whereas they never denied that the company should in private law be considered to be the legitimate owner of the property seized or sequestered ; whereas reasons of public weal and national safety alone led them to admit that the enemy nationality of the shareholders must affect the character and functions of the company ;

Whereas, in order to bring out the real nature of the decision of the House of Lords in the case of *Daimler Company Ltd. v. Continental Tyre & Rubber Company* (1916 2 A.C. 307), and to show the error in the conclusions which the Standard Oil Company seeks to draw from it in favour of its theory, it is sufficient to quote the following passage from Lord Parker’s opinion : “ No one can question that a corporation is a legal person distinct from its corporators ; that the relation of a shareholder to a company, which is limited by shares, is not in itself the relation of principal and agent or the reverse ; that the assets of the

company belong to it, and the acts of its servants and agents are its acts while its shareholders as such have no property in the assets and no personal responsibility for those acts ” ;

Whereas the decision quoted above, without ignoring either the personality of a company or its right of ownership in the corporate assets, merely draws certain conclusions from the control which is or may be exercised by a shareholder or a group of shareholders over the activity of the company ;

Whereas to state that a physical person, a legal person or a group of physical or legal persons exercise a preponderating influence over a given legal person is obviously not equivalent to declaring or admitting that they have a right of ownership in the property of the latter ;

Whereas this is so true that when the legal person controlled is an enemy its property can be seized, no account being taken of the fact that the third parties vested with this control are allied or neutral ;

Whereas, although it has happened that, for the reasons above set forth, allied companies have been found to be enemy in character and have been treated as enemies, it has not happened—no legal decision is quoted to this effect—that enemy companies have not been treated as such, even when some or all of the shareholders were of allied or neutral nationality ;

Whereas the Supreme Court of the United States sustained a similar theory in the case of the “ Pedro ” (175 U.S. 354), in which a vessel belonging to a Spanish company and captured by the American Navy during the Spanish-American war was declared lawful prize by the Supreme Court, although all the shares of this company were held by British nationals ;

(d) Whereas finally the awards of international arbitration relied on by the Standard Oil Company, in particular those rendered in the cases of the “ Delagoa Bay,” “ El Triunfo,” “ Alsop,” and “ Orinoco Steamship ” Companies, cannot be held to support its theory ;

Whereas in none of these cases has it been a question of granting or assigning to claimant shareholders or debenture-holders rights in any part of the corporate assets, but merely of granting them indemnity for damage caused by unjustified intervention on the part of the government ;

Whereas moreover in all these cases, and notably in the first two, which are the most important, it was clearly specified that the shareholders and debenture-holders were admitted, in view of the circumstances, to be exercising not their own rights but the rights which the company, wrongfully dissolved or despoiled, was unable thenceforth to enforce ; and whereas they were therefore seeking to enforce not direct and personal rights, but indirect and substituted rights ;

B.

Whereas, it is true, the conception of “ beneficial ownership ” has taken, in the oral argument of the Standard Oil Company as reproduced and completed in its supplementary memorial of August 31, 1923, a new form which this memorial presents as follows :

“ The owner of property may, or may not, be the beneficial owner of that property, and a beneficial owner may not be the owner, when that word is used in the proprietary sense. The owner may be the legal owner of the title to the property, but the beneficial owner is he who has or owns the beneficial interest

in that property. The words 'beneficial owner' as used in paragraphs F and G of the Agreement of June 7, 1920, must and can only have been used in the sense of the owner of the beneficial interest without the legal title " (page 42) ;

"The words 'beneficial owner' when used together can have but one meaning, and that is, the owner of the benefit, or the owner of the beneficial interest. In the case of a corporation, the corporation itself is entitled to receive the income from the property owned by the corporation, but the shareholders of the corporation are the parties for whose ultimate benefit such income is received. In the present case the D.A.P.G. were entitled to receive the profits derived from the tankers in question, but such profits were received by the corporation for the benefit of its shareholders, and therefore the shareholders were the beneficial owners of the tankers " (page 44) ;

Whereas, according to this new and alternative interpretation, the shareholder would be owner of the corporate assets, not in the legal but in the economic sense, in that he would be owner of the income produced by the operation of the corporate assets ;

Whereas, however, it is not correct to state that the shareholders have a right of ownership in the profits of the operation ; whereas indeed the profits belong to them only in so far as and when they are distributed ; whereas before this date they are precisely the property of the company, which at the General Meeting will decide as such, by the majority vote of the shareholders, on the use to be made of the profits ;

Whereas from that time the shareholders have a right of ownership only in that share of the income which it has been decided to allot to them ;

Whereas this right, and the right to share in the division of the assets of the company when dissolved, seem indeed to constitute the two essential characteristics of the right of the shareholder and to be merged with it, so that it is impossible to discern the distinct aspects of any " beneficial ownership " which might be added ;

C.

Whereas, in fine, according to the commentaries furnished and the documents produced by the Standard Oil Company, " beneficial ownership " constitutes a right of ownership for the shareholders either in the corporate assets or in the profits from the operation of these assets ;

Whereas, in the first hypothesis, this alleged right would be in contradiction with universal jurisprudence, in particular with that of the United States, Great Britain and France ;

Whereas, in the second hypothesis, it would be merged with the shareholder's right of ownership in his shares, and is therefore only a new expression for the same legal fact ;

Whereas, finally, in the course of its written and oral observations the Standard Oil Company has sometimes seemed to maintain that the beneficial ownership on which it relied was not included in the classic legal categories, but must be considered and recognized as a right of an economic nature ;

Whereas, however, to proclaim the economic character of an alleged right is not sufficient to vest it with the privileges and sanctions of a right of ownership ; whereas the right which the shareholder derives from his share is indisputably of an economic nature, but cannot confer upon him a right of ownership either in the corporate assets or in the corporate earnings, as has just been shown ;

Paragraph G.

Whereas the Standard Oil Company, not having made good its claim to the beneficial ownership of any of the tankers under paragraph F of the Agreement of June 7, 1920, it is for the Tribunal to ascertain whether this company is justified in claiming indemnity under paragraph G of the same Agreement ;

Whereas—in vain, so far as this paragraph is concerned—the Standard Oil Company seems at times to seek to maintain that the right to financial reimbursement necessarily arises from its possession of the shares of the D.A.P.G. ;

Whereas, since compensation under paragraph G should take the form of a surrender of boats, and since paragraph F provides for the event of the Standard Oil Company's establishing its beneficial ownership of some of the boats only, which alone would be assigned to it, the difference between the two paragraphs, in such a construction, is not evident ;

Whereas moreover the arguments previously adduced in connection with paragraph F to set aside the identity between beneficial ownership and ownership of shares may be extended to paragraph G, in respect of the alleged identity between the possession of shares and the right to financial reimbursement ;

Whereas, just as the ownership of shares can imply beneficial ownership in the corporate assets represented by the tankers only in so far as it is reinforced by a legal factor of which the Tribunal finds no trace in doctrine or jurisprudence, so the possession of these shares can confer a right to financial reimbursement only in so far as this right is founded on some express text or on considerations of justice involving a judicial sanction ;

Whereas, finally, when paragraph G lays down that a certain number of tankers, to be determined later, will be handed over to the Standard Oil Company only in so far as it may be found to be entitled to financial reimbursement, it clearly leaves it to the Tribunal to examine and to judge whether it is so entitled ;

(a) Whereas the essential if not the only title relied on by the Standard Oil Company is paragraph 20 of Annex II to Part VIII of the Treaty of Versailles ;

Whereas this article reads as follows in French and English :

“ *La Commission, en fixant ou acceptant les paiements qui s'effectueront par remise de biens ou droits déterminés, tiendra compte de tous droits et intérêts légitimes des Puissances alliées et associées ou neutres et de leurs ressortissants dans lesdits* ” ;

“ The Commission, in fixing or accepting payment in specified property or rights, shall have due regard for any legal or equitable interests of the Allied and Associated Powers or of Neutral Powers or of their nationals therein ” ;

Whereas it is to be remarked that there is a notable discrepancy in these texts, for while the English stipulates that due regard shall be had to any “ legal or equitable interests ”, which corresponds to very clear and well-known conceptions of English and American law, of which equity is a form, the French employs the infinitely vaguer phrase of “ *droits et intérêts légitimes* ” which corresponds to no definite legal idea ;

Whereas therefore everything points to the conclusion that the French phrase is merely the translation of the English, in which alone the expression employed has legal sense, and which makes clear the general tenour of the articles ;

Whereas if we rely on the meaning in English law of the words “ legal or equitable interests ” and if we consider that the hypothesis envisaged in para-

graph 20 is the "remise" to the Reparation Commission of "specified property or rights," it is obvious that the "legal or equitable rights" to which, according to this same paragraph, due regard shall be had, are only the real rights, the "jura in re";

Whereas it has just been shown that the rights of shareholders in the corporate assets cannot imply such a limitation;

Whereas it is to be noted that according to the decisions of American and British courts above mentioned the right of the shareholder implies no legal or equitable interest in the corporate assets;

Whereas it will be sufficient in this connection to recall that, in the case of *Eisner v. Macomber*, the Supreme Court of the United States declared that "the corporation has the full title, *legal and equitable*, to the whole (the entire assets, business and affairs of the company)," and that in the case of *Macaura v. Northern Assurance Company Ltd.* Lord Wrenbury, interpreting the opinion of the members of the House of Lords, declared that "no member of the company has any property, *legal or equitable*, in the assets of the corporation";

Whereas moreover the Reparation Commission, in its interpretation of paragraph 20, agreed with this jurisprudence in so far as it confirmed the report of its Maritime Service of January 13, 1922, on "legal and equitable claims under paragraph 20";

Whereas this report rejected all claims advanced by Allied or neutral shareholders in German shipping companies whose boats had been handed over in execution of Annex III, because "a shareholder's interest in a shipping company owning a ship or ships cannot be regarded as a legal or equitable interest in the ship or ships under paragraph 20";

(b) Whereas, it is true, it was a question only of claimants possessing some shares of these companies, and whereas the Standard Oil Company has several times relied on the fact that it was practically the sole shareholder and the sole creditor of the D.A.P.G.;

Whereas, however, paragraph 11 of Annex II, which may be relied on in this discussion with as good reason as paragraph 20 of the same Annex, specifies that the decisions of the Reparation Commission must follow "the same principles and rules in all cases where they are applicable";

Whereas this provision makes it obviously impossible to draw a distinction between the holder of a share in a company and the holder of all the shares;

Whereas only the extent and not the nature or the essence of his right can vary with the number of shares that a shareholder may possess;

Whereas moreover it is inconceivable in practice that during the existence of a company and the transfers of shares that take place the rights of shareholders in the corporate assets could vary with the number of shares held by each of them;

Whereas these rights must be identical, whether the company's shares are distributed among many holders or are owned by a single holder;

Whereas it will be sufficient to recall in this connection the decisions of the House of Lords above quoted in the cases *Gramophone Company Ltd. v. Stanley* and *Macaura v. Northern Assurance Company Ltd.*

(c) Whereas, it is true, this same paragraph 11 of Annex II states that the Commission "shall be guided by justice, *equity* and good faith" and that the Tribunal is equally bound to consider the Standard Oil Company's claim from the point of view of equity, above all since this company has on several occasions made a final appeal to reasons of equity;

Whereas, however, the entire theory of the Standard Oil Company rests on the establishment of its right of ownership, on January 10, 1920, in the shares of the D.A.P.G., that is, shares involving, together with the right to vote, the control of this company ;

Whereas in fact it is obvious that if the Standard Oil Company had been able to rely only on the ownership of share warrants and debentures on this date, if it had been unable to come forward only as a creditor, even a first creditor, of the D.A.P.G., its claim would have been deprived of all legal basis and devoid of any consideration of equity ;

Whereas the sale of shares to which it proceeded in February, 1917, in favour of a German national was, according to the Standard Oil Company, a regular and valid sale *erga omnes* ; whereas the Standard Oil Company has not ceased to contend, before the Alien Property Custodian, that in its view the sale preserved this character ;

Whereas, although the Tribunal has nevertheless deemed it necessary to set aside this contract of sale, thereby allowing the right of ownership of the Standard Oil Company in the shares on January 10, 1920, to stand, it was only by strict application of the German law, which has remained exceptionally formalistic on this point ;

Whereas the Standard Oil Company was able to submit its claim to the Tribunal only by the application of strictly legal considerations ;

Whereas therefore it does not seem that the Standard Oil Company, which, in order to be able to take advantage of paragraph 20, was obliged to rely on strictly legal arguments, can be allowed, in order to escape from the interpretation which this paragraph implies and from the application of it made by the Reparation Commission to shareholders in other shipping companies, to rely on mere considerations of equity ;

(d) Whereas moreover, even if we set aside this argument and rely solely on arguments based on *equity*, they do not justify granting financial reimbursement to the Standard Oil Company ;

Whereas, first of all, the Standard Oil Company cannot, in support of its claim for reimbursement, rely on the arbitral awards rendered in the cases mentioned above ;

Whereas, in fact, the damage involved in these cases, for which the foreign shareholders or debenture-holders obtained reparation through international channels, was damage caused by government intervention recognized to be wrongful ; whereas thus, in the cases of the Delagoa Bay and El Triunfo companies, the Portuguese and Salvador Governments, in appropriating without compensation the property of these companies by arbitrary measures which affected them alone, had committed acts that might be ranked as overstepping of authority or abuse of law ;

Whereas in the present case no such grievance could be or has been brought forward ; whereas it was in execution of an international undertaking that the German Government proceeded to the confiscation of the tankers ; whereas moreover it has not been claimed that the indemnity paid under this head to the D.A.P.G. by the said Government was comparable to that which in the same circumstances has been granted to other German shipping companies ;

Whereas, in application of a generally accepted principle, any person taking up residence or investing capital in a foreign country must assume the con-

comitant risks and must submit, under reservation of any measures of discrimination against him as a foreigner, to all the laws of that country ;

Whereas therefore an Allied or Associated national having invested capital in Germany has no ground for complaint if for this reason he incurs the same treatment as German nationals ;

Whereas this principle of equality of treatment, and not of discrimination in favour of Allied and Associated nationals, has moreover been consecrated by the Treaty of Versailles in Articles 276 C and D and 297 J dealing with the treatment to be accorded in Germany to the property and interests of the said nationals after January 10, 1920 ;

Whereas this same principle seems also to have been followed by the Reparation Commission in the case of laws for the execution of the Dawes Plan ;

Whereas in fact several metallurgic and mining companies, indisputably German, but of which most or all the shareholders were Allied nationals, having protested to the Reparation Commission against the submission of their concerns to the mortgage charge represented by the industrial debentures of the Dawes Plan, the Commission merely transmitted their claims to the Trustee for these Debentures, together with the unanimous opinion of its Legal Service (Opinion No. 527 of November 27, 1924) ; whereas this opinion rejected the claims because all foreign nationals, including Allied and Associated nationals, residing in Germany or possessing property there, must be considered to be subject, on the same footing as German nationals, to the payment of the charges provided for by the laws carrying out the Dawes Plan ;

Whereas, in fine, at the time of the confiscation of the tankers of the D.A.P.G., the German Government committed no act of discrimination against this company as compared with other German shipping companies ;

Whereas therefore the granting of compensation to the Standard Oil Company cannot be justified, as against these companies, by any consideration of equity ;

Whereas such compensation could not in equity be justified as against the other Allied or neutral shareholders in German shipping companies, since the claims for compensation advanced by these shareholders have rightly been rejected by the Reparation Commission ;

Whereas it is true that these same shareholders held only a few shares, but whereas it seems that equity would be thwarted *a fortiori* if a shareholder could collect, as the holder of a large number of shares, an indemnity which had been refused to less important shareholders ;

FOR THESE REASONS

THE TRIBUNAL

Declares that the Standard Oil Company has not made good its claim to beneficial ownership of any of the tankers in question, under paragraph F of the Agreement of June 7, 1920 ;

Declares that neither is the Standard Oil Company justified in claiming indemnity under paragraph G of the same Agreement ;

Finds, therefore, that the tankers *Niobe*, *Pawnee*, *Hera*, *Loki*, and *Wotan*, as well as the proceeds of their operation and the proceeds of the sale of the tankers *Helios*, *Mannheim*, and *Sirius*, shall remain, under Annex III to Part VIII of the Treaty of Versailles, the property of the Allied and Associated Governments represented by the Reparation Commission.

The present award is drawn up in two copies signed by MM. Erik Sjoeborg and Jacques Lyon.

One of these copies is deposited with the General Secretariat of the Reparation Commission at Paris.

The other copy is delivered to the Government of the United States of America, by the intermediary of Mr. Hill, Unofficial Delegate of the said Government to the Reparation Commission.

Done and signed at Paris this fifth day of August, one thousand nine hundred and twenty-six.

Signed : ERIK SJOEBORG. JACQUES LYON.

DISSENTING OPINION OF COLONEL HUGH A. BAYNE.

Paragraph F.

I regret that I cannot concur in the decision of my learned colleagues.

I am of the opinion that the Standard Oil Company has made good its claims to beneficial ownership of all of the tankers in question, except the *Riedemann*, and that, therefore, under Paragraph F of the Arbitration Agreement of June 7, 1920, those tankers should be awarded to it.

In applying Paragraph F of the Agreement the point of divergence which separates me from my learned colleagues is not one of law, but of interpretation of the language of the above Agreement.

They interpret the Standard Oil Company's "claim to beneficial ownership" to mean a claim that its ownership of the shares of the D.A.P.G. vested it with an "estate legal or equitable" in the assets of the D.A.P.G. in the technical sense of that expression as a term of private municipal law.

If such had been the basis of the claim I would have no hesitation in rejecting it. Often as the Courts have given effect to the obvious fact that the shareholders are the real parties in interest where the assets of the corporation are in question, they have found ways to do so without classifying the interest as "an estate legal or equitable" in the assets. (See Appendix A at page 178 hereof.) Indeed the Courts are so unanimous in holding that a stockholder has no "estate legal or equitable" in the corporate assets, in the technical sense, that, in addition to my other reasons for holding that the claim made was not of that technical character, I should find it difficult to believe that the United States would have advanced or that the Reparation Commission would have supposed that they were basing their claim upon a technical legal proposition which any lawyer could readily have advised them was contrary to the unanimous decisions of the Courts.

The claim of the Standard Oil Company was simple as to its facts, and, in my opinion, was obvious as to the equity of the appeal for relief which was based on those facts. The simple nature of the claim under Paragraph F has been obscured by what I deem to have been an irrelevant discussion of classification under some of the most technical rules of private municipal law.¹

¹ For instance, the interest of the shareholders in the corporate assets, though it entitles them to full ownership thereof on dissolution of the corporation, is not classified, under the rules of private municipal law, as an "estate in the assets legal or equitable," even at the moment of the dissolution of the corporation when it entitles the shareholders to present possession and full ownership of the assets. Actually and potentially,

As to the facts claimed, they were that the German corporation, the D.A.P.G., in which ownership of the tankers was vested, was organized, owned and controlled by the Standard Oil Company of New Jersey, an American citizen, and for thirty years had been operated as an integral part of its international commerce; that the total capitalization of the D.A.P.G. was M. 60,000,000 represented by shares, share warrants and debentures as follows: shares M. 9,000,000; share warrants, M. 21,000,000; debentures, M. 30,000,000; that, while only the shares carried voting powers, yet all three classes of these securities represented a substantially identical interest in the property and business of the corporation and participated alike in its earnings; that at the relevant date the Standard Oil Company owned over 99.91 per cent. of the M. 30,000,000 of shares and share warrants and over 99.98 per cent. of the M. 30,000,000 of debentures.

As to the equity of the appeal for relief which was based on these facts, it was that it resulted therefrom that the entire substantial or economic interest in the tankers was vested in an American citizen, and that to take them to indemnify the Allied Powers for Germany's wrong would be in substantial effect to enrich these Powers (and Germany, who would receive a credit) at the sole expense of a citizen of one of their Allies in the War.

The justice of the above appeal for relief had already been recognized by Great Britain and France (to whom the tankers here in dispute would be allocated if retained) when, in the early part of the War, Great Britain surrendered the captured D.A.P.G. tanker *Leda* to the Standard Oil Company on exactly the same claim of facts and on exactly the same equitable appeal, characterized by exactly the same name of "beneficial ownership," and Great Britain and France, on the same grounds, consented to the transfer to the Standard Oil Company and to the American flag of other D.A.P.G. tankers in foreign ports.

The respondent replies that, in so doing, these Powers yielded to motives of policy and not to rules of law. That is true, for, under existing rules of law, the beneficial owners, however that term be interpreted, are never entitled to present ownership of the property.

Under the rules of law the tankers, having been legally vested in a German corporation, were, by the Treaty, vested in full ownership in the Allied and Associated Powers who ratified the Treaty. This was the clear and absolute legal situation. Therefore in stipulating by the Agreement of June 7, 1920, that the tankers would be awarded to the claimant if it established its "beneficial ownership" thereof, the interested Powers were yielding not to rules of law, but to motives of policy which induced them to deal with a friendly Power equitably rather than legally; to yield their strict legal rights in favour of equitable considerations.

But, since the date when the interested Governments, without requiring any arbitration, had transferred the *Leda* to the Standard Oil Company, and consented to the transfer to it of the other tankers, a new question had arisen, viz.: was the Standard Oil Company *in fact* owner, as it claimed, of substantially all of the shares, and if not, what was the extent of its interest.

The validity of the attempted sale in February, 1917, of the M. 9,000,000 of voting shares was in question. To decide that and the other questions involved in the Agreement of June 7, 1920, the present Tribunal was constituted.

however, the shareholders' above interest in the assets is nearer to full ownership than most of the interests therein which are classified as "estates legal or equitable."

We are unanimous in holding that all of the disputed questions of fact must be decided in favour of the claimant.

We are divided, however, in our interpretation of what the parties *must be held to have meant* by the term "beneficial ownership."

I say "*must be held to have meant*" by the expression "beneficial ownership" because it is not in itself a term of clear significance; nor has it yet become a term of art. It is not defined nor even referred to in the law dictionaries and digests to which I have had access. It is of modern origin and is mainly in popular use, though, as I shall show presently, eminent legal authorities have used it to refer not to an "estate legal or equitable" in the technical sense, but to the well-known attributes and rights of a beneficial and proprietary character in the corporate assets and profits which pertain to the shareholders' interest.

We know, and the Reparation Commission knew, that the claimant used it in that sense. We are not permitted to say that the Reparation Commission agreed to that meaning, for Sir John Bradbury, their representative in the negotiation of the final terms of the Agreement of June 7, 1920, refused to define in advance the meaning of the term, though he never denied that it meant the foregoing kind of interest nor asserted that it meant an "estate legal or equitable" in the ships, in the technical legal sense.

According to a cablegram of April 29, 1920, from Mr. Boyden to his Government, Sir John, after first characterizing Paragraph F as follows, refused to concede in advance that, under Paragraph G, tankers should be awarded in mathematical proportion to the proved stock ownership. But he expressed the following view on the claim which is interesting and significant.

"Bradbury expressed subject to further reflection the view that if Standard Oil proved ownership of substantially all securities and based claim on theory that under such conditions tankers *should be regarded* as property United States citizen, even though flew German flag, and even though technical title in German corporation, then very strong case presented and no dangerous precedent established by decision of Tribunal to that effect, but Bradbury did not think that Tribunal would decide or that Reparation Commission had power now to concede that Standard Oil ownership of one share or 50 per cent. of shares or securities entitled Standard Oil to any tankers. Felt such concession by Commission very dangerous though no objections to Standard Oil's arguing point to Tribunal, but concession by Commission would make possible claim for exemption or indemnity from Reparation Commission in kind or in money by an Allied or neutral shareholder in German company or any other German corporation affected by reparation."

And on May 20, 1920, Sir John wrote out his understanding of the claim as follows: "If the Commission rightly understands the contention of the United States Government it is that the vessels in question are *substantially* the property of United States citizens by reason of the fact that an American company is the proprietor of practically the whole of the securities of the German Company to which they belong."

Though unwilling formally to agree on a definition of "beneficial ownership" Sir John clearly understood that the claim was not that the tankers were the property of an American citizen, but that, because of its ownership of all the corporation's securities, the tankers "should be regarded as" its property; that by reason of such totality of stock ownership they were, though not in form,

nevertheless "substantially" the property of the claimant. Though unwilling to agree on a definition of "beneficial ownership" Sir John was ready to accept as the meaning whatever the Tribunal held that the parties *must be held to have meant* by it. The responsibility of this decision thus would rest on the Tribunal and not on the Reparation Commission.

My colleagues suggest that the proposed form of Paragraph F: "If the Standard Oil Company makes good its claim to beneficial ownership the tankers shall be awarded to that Company" was amended by Sir John Bradbury by adding after "ownership" the words "of all or any of the tankers" for the purpose of making it clear that he did not concede that ownership of all of the securities should necessarily mean "beneficial ownership."

The answer to this suggestion is that the words were necessary and were added for another reason, namely: that other parties were claiming some of the tankers, and, if, as in the case of the *Riedemann*, a superior title was proven by those parties, the Reparation Commission could not properly agree to award all of the tankers to the claimant.

But the above argument of my colleagues turns against their view, for it shows that they consider that "beneficial ownership" without the addition of limiting expressions might properly be interpreted in the sense in which I interpret it.

In interpreting "beneficial owner" as synonymous with "proprietor of an estate legal or equitable" I think that my colleagues have exerted a mistaken lawyerlike zeal in endeavouring to bring within the boundaries of familiar legal rules and legal terms the language of an agreement in which the parties disregarded strict legal rules and made the decision depend upon the interpretation of a term of popular rather than of well-defined legal signification.

In so waiving the strict rule of law in favour of equitable considerations, the Reparation Commission, acting for the interested Powers, followed the precedents of the Delagoa Bay Railway case, the Salvador Commercial Co. case and the Alsop case, cited by the claimant in its brief. These were all international arbitrations provoked by diplomatic representations made on behalf of shareholders and security holders damaged by the unjust taking of the corporate assets. Under existing rules of law their interest in the assets was not an estate therein legal or equitable and gave them no right of action. But the interested Powers, by agreements made to meet the particular cases, waived the defences of the strict rules of law in favour of equity and substantial justice, recognizing that the shareholders and security holders of the corporation were the real parties damaged by the unjust taking of the corporate property, technical rules of municipal law to the contrary notwithstanding.

By interpreting "beneficial ownership" as synonymous with "ownership of an estate legal or equitable," my colleagues have, I believe, defeated the purpose of the agreement.

Under the strict rules of law, full legal ownership of the tankers was vested first in the German corporation, and then by the Treaty in the Allied and Associated Powers who ratified the Treaty. Unless these Powers had agreed to waive their rights under existing rules of law no tribunal, municipal or international, applying existing rules of law could have awarded the tankers to the Standard Oil Company.

It was to meet the alleged inequitable situation created by the law that the

parties resorted to an agreement by which the tankers should be awarded, not according to the rules of law, but according to rules formulated by the parties for the particular case. Under no known rules of law is one entitled to present ownership of an object in which his interest is less than full ownership. Neither the proprietors of estates legal or equitable less than ownership nor the proprietors of the entire economic interest, the shareholders, are entitled under the rules of existing law to the remedy provided by Paragraph F in favour of the "beneficial owner" of the tankers. In agreeing to award ownership of the tankers on grounds other than complete legal ownership, the parties, for the purpose of doing substantial justice, went outside of the existing rules of the law. Therefore, I believe that, in the absence of clear reasons to the contrary, the parties to this international agreement of arbitration ought not to be held to have used the popular expression "beneficial ownership" as synonymous with the technical legal expression "estate legal or equitable," an interest which, in strict law, would no more carry the right to the remedy provided by the agreement than would the economic interest arising from ownership of all of the shares, an interest whose equitable appeal was not as strong as the equitable appeal of ownership of all of the shares and debentures.

If we had no guide to its meaning save the expression itself, we would have to decide that in relation to the assets of a corporation "beneficial ownership" in the first place did *not* mean ownership; the prefix "beneficial" shows that it means something different from ownership. It must therefore refer to an interest in the assets having attributes of ownership of a beneficial character.

The shareholders' interest in the assets of a corporation is of the foregoing character. They are vested with the entire lucrative or economic interest in the corporate assets, and with the following juridical rights, namely: the right to exploit the assets for their benefit and profits through representatives chosen by them, to receive the benefits of such exploitation in the form of declared dividends; to invoke the aid of the Courts (by suing in the Corporation's name), to protect their above interest in the assets from loss or waste in certain cases where their authorized corporate representatives fail or refuse to or are incapable of protecting them, and ultimately, on dissolution and payment of the Company's debts, the right to enter into the full possession and ownership of the assets.

We are not, however, obliged to rely solely on an analysis of the words themselves to determine the meaning of "beneficial ownership."

Eminent jurists have used the expression in the foregoing sense.

In his work on *Private Corporations*, 2nd edition, Mr. Morowetz, one of the most eminent of our American authorities on corporation law, refers to the stockholders as the *beneficial owners* of the corporate assets.

Mr. Morowetz uses the expression *beneficial owners* in the sense in which the Standard Oil Company used it to characterize its claim. It is perfectly clear that Mr. Morowetz, when he uses the term, is not asserting any disputed theory relative to the attributes of stock ownership. That he does not by characterizing the interest to which he refers as "beneficial ownership" mean to claim that the stockholders are vested with a present estate in the assets in the technical sense is shown, not only by the context in which he uses the term, but by the fact that, elsewhere in his work, he recognized the limitations on the rights and remedies of stockholders which are laid down in the decisions which have been cited by the counsel of the Reparation Commission. In other words, Mr. Morowetz and

the other authorities cited below consider that "beneficial ownership" appropriately describes the underlying economic interest which carries important rights and attributes of a beneficial and proprietary character, though among those rights and attributes is not included a present estate in the assets, in the technical sense of that term.

Mr. Morowetz says: "In equity, the conception of a corporate entity is used merely as a formula for working out the rights and equities of the *real parties in interest*, i. e. the shareholders . . . Even in those cases in which only corporate rights and obligations are involved, and the corporation is nominally interested only, as an entity, the Courts are constantly obliged to consider that the real persons in interest are the individual shareholders. . . . The fact that the legal title of a corporation to property held by it becomes extinguished by a dissolution is no reason why the beneficial owners should lose their rights."¹

Mr. Morowetz considers it proper, therefore, to refer to the stockholders as the "beneficial owners" of the corporate assets, not because he pretends that their interest constitutes an "estate legal or equitable" in the assets (for he concedes that it does not), but because that interest makes the stockholders the *real parties in interest* in all matters affecting the assets and carries with it attributes of a beneficial and proprietary character which the law recognizes and enforces.

In *Lynch v. Turrish* (No. 236, Fed. Rep. 656, affirmed on appeal by the U.S. Supreme Court, 247 U.S. 221) Mr. Justice Sanborn, now a member of the United States Supreme Court, in giving the opinion of the Court, said that the stockholders were the *beneficial owners* of all the corporate property. He said:

"It is true that a corporation holds the legal title of and the right to manage, control, convey its property, and that a stockholder is without that title and right. But after all, the corporation is nothing but the hand or tool of the stockholders in which they hold its property for their benefit. They are the equitable *beneficial owners* of all of its property and it is the mere holder and manager of it for them . . . so in reality, as against its stockholders, a corporation has no, and they have all the beneficial interest in its property. Every substantial increase in the value of its property immediately and proportionately increases the actual value of their stock and every substantial decrease of its value immediately decreases the actual value of the stock."

Mr. Justice Sanborn, in this case, while characterizing the stockholder's interest in the assets as "beneficial ownership," conceded at the same time that "a stockholder has no legal title or right to the income, gains, or profits of his corporation until the dividends of that income, or of those gains or profits, have been declared." Furthermore, in the case of *Walson v. Bonfils* (116 Fed. Rep. 157), the same judge (Sanborn) held that where one corporation owned all of the stock and was the sole creditor of another, the two are "existing entities as distinct and separate from their stockholders and creditors as is one individual from another."

Obviously, therefore, Judge Sanborn, like Mr. Morowetz, while recognizing the limitations of the stockholders' rights which are laid down in the decisions referred to by the counsel of the Reparation Commission, regarded "beneficial ownership" as an appropriate term to describe the stockholder's substantial

¹ Morowetz on Private Corporations, 2nd edition, I, 22, 222, 225, 231; II, 990, 991.

interest which carried important attributes of a beneficial and proprietary character which the law enforced.

In *Brock v. Poor* 216 New York 387 (1915), page 401, the Court refers to the stockholders as *the ultimate or equitable owners* of its (the corporation's) assets, in the very sentence in which it affirms the principle "that the corporation in respect of corporate property and rights is entirely distinct from the stockholders who are the *ultimate or equitable owners* of its assets; that even complete ownership of capital stock does not operate to transfer the title to corporate property and that ownership of capital stock is by no means identical with or equivalent to ownership of corporate property."

In *Flynn v. Brooklyn City R.R. Co.*; 158 N.Y. 493, the same Court, in recognizing the right of a stockholder to sue on behalf of all of the stockholders to set aside a fraudulent lease of the corporate assets made by the directors, said at page 504:

"The stock owned by the plaintiff made him the *equitable owner* of an undivided fractional part of the entire assets of the Company."

It is evident, therefore, that there is no inconsistency between the decisions which designate as "beneficial ownership" the shareholders' interest in the corporate assets and the decisions which hold that the shareholders have no present legal or equitable estate in and to the corporate assets.

If text-writers and courts use "beneficial ownership" to refer to the foregoing economic interest and to the attributes of a beneficial or proprietary character which renders the stockholders the real (as distinguished from the technical) parties in interest in matters affecting the corporate assets, this Tribunal ought not to strain to find that the term was used in a technical sense in an international agreement whose purpose was remedial, in that it accorded to the "beneficial owner" rights and remedies not recognized under existing law, that is, the right of the "beneficial owner" to full ownership and the remedy of present possession in full ownership.

If, as I conclude, the expression "beneficial ownership" as applied to the stockholders' interest in the assets does not mean that they are vested with an estate legal or equitable therein, then it would be irrelevant whether the Standard Oil Company did or did not argue that stockholders, in addition to the other attributes of stock ownership, were vested with such an estate. But my colleagues are mistaken, I believe, in assuming that the claimant did so argue. The quotations from the brief, upon which they rely, separated from their context, do not reproduce the claimant's real meaning.

The paragraphs quoted or referred to are 17, 18, and 19 at pages 114, 115 of the claimant's brief. Read together, the basis of the claim of "beneficial ownership," namely the "lucrative or economic interest," is fairly set forth; the legal title of the corporation in the corporate property is fully recognized, and the right of beneficial enjoyment and ultimate possession are the attributes to which especial reference is made. The statement of the brief that the interest which carries the above attributes "reaches the property itself" does not necessarily imply a claim to a present "legal or equitable estate" in and to the property in the technical sense, for it fairly refers to the right of the stockholder ultimately on dissolution to possess the assets in full ownership.

In Paragraph 17, it is fairly conceded that beneficial ownership of the assets is subject to the control and use of the property through the agencies prescribed

by the corporate organization, and the final statement of the paragraph that the shareholders "as the ultimate owners have a distinct and positive right of property which the law recognizes and protects" is another way of saying something which, if put in a slightly different form, no one would, I think, deny, namely, that the right of the shareholders, after the *dissolution* of a corporation and the payment of its debts, to the possession and ultimate ownership of the corporate assets is a distinct and positive right of property which the law recognizes and protects.

It is misleading, I think, to read the words which are used to characterize the right separately and apart from the entire context which limits and describes the right which is thus characterized.

There is nothing in Paragraph 18 and 19 of the S.O. Co.'s brief inconsistent with the definition of "beneficial ownership" as I have interpreted it.

Paragraph G.

Although the claimant was led to believe, during the negotiation of the Treaty, that its claim would receive equitable consideration under the terms of Paragraph 20 of Annex II, I am obliged, for the technical reasons set forth by my colleagues, to concur in their interpretation of that paragraph as limited to estates in property legal or equitable in the technical sense of that expression. Paragraph 20 does not therefore afford any equitable relief for the damages suffered by shareholders on account of the inequitable taking of the corporate assets.

I do not, however, concur in the views of my colleagues regarding the equities of the claim for financial reimbursement, but refer to my views on that subject set forth in my above opinion regarding the application of Paragraph F.

CONCLUSION.

For the foregoing reasons I am of the opinion that, by "its claim to beneficial ownership of all or any of the tankers," as used in Paragraph F of the agreement of 7 June, 1920, the High Contracting Parties must be held to have meant the Standard Oil Company's claim that it was proprietor of the entire economic and substantial interest in the tankers, arising from its ownership of substantially all of the securities of the corporation in which at the relevant date the legal ownership of the tankers was vested.

Having established its foregoing interest in all of the tankers except the *Riedemann*, I am of the opinion that the claimant is entitled, under the agreement, to an award of the tankers *Niobe*, *Pawnee*, *Hera*, *Loki*, and *Wotan*, and of the proceeds of their operation, and of the proceeds of the sale of the tankers *Helios*, *Mannheim*, and *Sirius*.

The present dissenting opinion is drawn in two duplicate originals, each signed by Hugh A. Bayne.

One copy is deposited at the General Secretariat of the Reparation Commission at Paris, and the other copy is delivered to the Government of the United States of America, by the intermediary of Mr. Hill, Unofficial Delegate of the said Government to the Reparation Commission.

Done and signed at Paris, the 5th day of August, 1926.

Signed : HUGH A. BAYNE.

APPENDIX A

In *Ludvig v. Woolen Co.*, 159, Fed. Rep. 796, the Court said :

“ For purpose of equity courts will look behind that artificial personality, and, if need be, ignore it altogether.”

In *Anthony v. American Glucose Co.*, 146 N.Y. 407 (1895), the Court said :

“ We have of late refused to be always and utterly trammelled by the logic derived from the corporate existence where it only serves to distort or hide the truth.”

In *U. S. v. Milwaukee Co.*, 142 Fed. Rep. 247, the Court said :

“ When the notice of legal entity is used to defeat public convenience, justify wrong, protect fraud or defend crime, the law will regard the corporation as an association of individuals.”

Cook, in his work on Corporations (6th ed.) par. 663 at page 1983 says :

“ The abstractions of the corporate entity should never be allowed to bar out or pervert the real and obvious truth.

“ The chief application of this statement of law is in cases of fraud, but there is a line of cases which apply this rule where there is no fraud, and where the owner of the stock is held liable merely because he owns *all* of the stock of the corporation.

“ Thus, it has been held that where a railroad company causes a telegraph company to be incorporated, and subscribes to all its stock, and appoints all its officers, and holds it out as the future owner of a telegraph system which the railroad owns, and then sells that system to some one else, a person contracting with the telegraph company on the faith of the scheme being carried out may hold the railroad company liable on the contract, on the principle of a principal being liable on the contract of its agent. It has also been held that where the corporation does business by organizing branch corporations, and the stockholders in the latter are disregarded, and the main corporation pays up the stock and manages it without regard to its corporate character, the property of the branch corporation is subject to the debts of the parent company. A corporation organized by a patentee to infringe a patent, which he sold, is estopped the same as he would be to deny its validity. And there are other decisions to practically the effect that the Courts will ignore the corporate existence under certain circumstances.”

And at page 1896-7 (and see p. 1987) :

“ Where one corporation is merely a ‘ dummy ’ of another corporation, a mortgage on the property of the latter may attach to property of the former, even in priority to a new mortgage on the property of the former.”

Citing *Central Trust Co. v. Kneeland* 138, U.S. 414.

And at page 1972 :

“ Where a bankrupt practically owns the entire capital stock of a corporation, the bankruptcy court will consider the corporation as merely an agent of the partnership and will extend its jurisdiction over its property and determine in the bankruptcy proceedings the respective rights of the creditors of both concerns.”

The Court said :

“ The fiction of legal corporate entity cannot be so applied by the partners as to work a fraud on part of their creditors, or hinder and delay them in the collection of their claims, and thus defeat the provisions of the bankrupt act. The doctrine of corporate entity is not so sacred that a court of equity, looking through forms to the substance of things, may not in a proper case ignore it to preserve the rights of innocent parties or to circumvent fraud.” (*In re Rieger* 157, Fed. Rep. 609.)

DECISIONS OF THE AMERICAN-MEXICAN MIXED CLAIMS
COMMISSIONS, 1926.

By two conventions, one signed at Washington, September 8, 1923, the other at Mexico City, September 10, the same year, the United States and Mexico agreed to appoint two commissions to "settle and adjust amicably" certain claims of the citizens of each country against the other. Under the terms of the conventions each commission was to consist of three members: one appointed by each government and the third to be selected by mutual agreement between the two governments. The commission appointed in pursuance of the convention of September 8, known as the *special* claims commission, was charged with examining and deciding all claims arising from losses and damages suffered by American citizens in consequence of "revolutionary" acts occurring within the period from November 20, 1910, to May 31, 1920. The specific acts for which damages were to be awarded were those committed by the forces of any government in Mexico, *de jure* or *de facto*; by any revolutionary forces; by disbanded federal forces; by mutinies, mobs or insurrectionary forces other than those mentioned above and by bandits in any case where it was established that "the appropriate authorities omitted to take reasonable measures to suppress insurrectionists, mobs or bandits, or treated them with lenity, or were in fault in other particulars."

The other commission, known as the *general* claims commission, was charged with hearing and deciding generally all claims by the citizens of each country against the other for losses and damages in person or property suffered since the signing of the claims convention of July 4, 1868, and which remained unsettled. The general claims commission was required to base its decisions on "the principles of international law, justice and equity"; the special claims commission was charged with deciding in accordance with "the principles of justice and equity." The convention which provided for the latter commission expressly affirmed that Mexico desired that her responsibility should not be fixed "according to the generally accepted rules and principles of international law, but [that she] *ex gratia* feels morally bound to make full indemnification, and agrees, therefore, that it will be sufficient that the alleged loss or damage in any case was sustained and was due to any of the causes enumerated in Article III hereof," that is, due to acts committed by the forces mentioned above, including mobs and bandits, subject to the reservation referred to.

It was also agreed that neither commission would disallow or reject any claim "by the application of the general principle of international law that the legal remedies must be exhausted as a condition precedent to the validity or allowance of any claims."

Dr. C. van Vollenhoven of the Netherlands was selected as the presiding commissioner over the general commission, and Dr. Rodrigo Octavio of Brazil was chosen to preside over the special commission. Several thousand claims were duly filed before the general commission and about 2,000 before the special commission, the latter aggregating in amount some \$1,225,000.

SPECIAL CLAIMS COMMISSION.

" Revolutionaries " or " Bandits "—Santa Isabel case.

The special commission began its sittings in Mexico City in 1923, and in April, 1926, rendered an award in the *Santa Isabel* case, since which time the work of the commission has been suspended.

The facts of this case were briefly as follows: on January 10, 1916, a party of fifteen unarmed American mining engineers and employees, while returning to their mine from the United States where they had withdrawn during the preceding year, were murdered under peculiarly cruel circumstances by an armed band of Mexicans commanded by one Lopez. The American and Mexican commissioners having disagreed as to the responsibility of the government of Mexico, Dr. Octavio, the presiding commissioner, rendered a decision holding that at the time the affair occurred Villa and his followers, among whom were the murderers in the present case, were no longer revolutionists (the period of the revolution according to him having virtually ended January 1, 1916), but bandits pure and simple, and that since it was established that the Mexican government had not omitted to take reasonable measures to disperse and capture them—many of those who participated in the massacre at Santa Isabel, including their leader, were in fact captured and executed—Mexico was not bound under the terms of the convention to indemnify the claimants. The American commissioner vigorously dissented from this decision, the effect of which he asserted amounted to a "nullification" of the convention and eliminated about ninety per cent. of the American claims against Mexico. He admitted that the offenders were bandits, but maintained that they were also revolutionists for whose acts Mexico was responsible by the terms of the convention. He emphasized that the victims of the massacre had returned to their mine with passports issued by the Mexican authorities and with the assurances of General Obregon that the resumption by them of the operations of the mine was desired by the Mexican government, and that they would be afforded the necessary protection by the public authorities. Finally, he asserted that the opinion of the presiding commissioner that Villa's followers ceased to be revolutionists a few days prior to the Santa Isabel massacre and became henceforth simple bandits was arbitrary and unsupported by evidence.

The decision of the presiding commissioner has caused much dissatisfaction in the United States, and efforts have been made to secure a rehearing of the case. Since the bulk of the American claims are similar in character to those in the Santa Isabel case, the American government has not considered it worth while to present them to the commission.

GENERAL CLAIMS COMMISSION.

Liability on postal money orders issued by a previous government.

The work of the general claims commission, on the other hand, has proceeded without interruption and some important decisions have been rendered. In the case of *George W. Hopkins, claimant*,¹ the question involved was the liability of the Mexican government for the payment of certain postal money orders issued

¹ Decided March 31, 1926.

by the government of Huerta in the year 1914. Liability was denied on the ground that, being a usurper, the contractual acts of his administration were not binding upon the Mexican government. The commission held, unanimously, that while there was no doubt that the "assumption of power by Huerta was pure usurpation," in determining the liability of Mexico upon contracts entered into by the Huerta administration it was necessary to distinguish between the acts of his administration in its "personal" character and acts of the government itself in its "unpersonal" character. The commission pointed out that the greater part of the governmental machinery in every modern state, such, for example, as the postal service, is not affected by changes in the higher administrative posts and the transaction by the citizen of business with the government is not personally with the rulers but with the administrative departments and bureaux. It is the same in international relations. Thus the United States, while refusing to recognize Huerta, kept its embassy and consulates in Mexico open for the transaction of routine business and maintained "unpersonal" relations with the Huerta administration. The purchase by the claimant of postal money orders belonged to the category of "purely government routine having no connection with or relation to the individuals administering the government for the time being." His money order was a contract which was unaffected by the legality of the Huerta administration as such, and it had not been and could not be nullified by any subsequent unilateral act of the government of Mexico. The refusal of the government of the United States to recognize Huerta and its warning to American citizens that it would not recognize his acts as legal were held not to have estopped the United States from espousing the claimant's case. This, it will be remembered, was in accordance with the view of Chief Justice Taft, sole arbitrator in the case of Great Britain and Costa Rica (1923).

Effect of clause in concession excluding resort to diplomatic remedies.

In the case of the *North American Dredging Company*¹ the commission considered the effect of the Calvo clause in a contract between an American corporation and the government of Mexico. By the terms of the clause in the present contract, the claimants had agreed to be considered as Mexicans in the Republic of Mexico in respect of all matters concerning the execution of the work for which the contract provided; that they would not claim with regard to the business of the contract any other rights or procedural remedies for its enforcement than those which the laws of Mexico gave to Mexicans; and that under no conditions should the intervention of foreign diplomatic agents be permitted in any matter relative to the contract. The claimants alleged non-performance of the contract obligations. For the Mexican government, it was argued that the agreement deprived the claimants of their right to submit to an international Tribunal any claim arising out of the contract. The commission held unanimously that the so-called Calvo clause in contracts between a government and foreign individuals or corporations was not repugnant to any recognized rule of international law. The government of Mexico had a perfect right to insist as a condition to the awarding of the contract that the foreign party should agree not to call upon his own government to intervene in his behalf in any controversy that might arise in connection with the interpretation or enforcement of the contract, but would

¹ Decided March 31, 1926.

be satisfied with the same remedies which the laws of Mexico provided for Mexican citizens in similar cases. Could the alien party lawfully bind himself by such an agreement? The commission held that he could, but at the same time it held that he could not by so doing deprive his government of its "undoubted right of applying international remedies to violations of international law committed to his damage," since the government might conceivably have a larger interest in maintaining the principles of international law than in recovering damages for one of its citizens in a particular case. He should not, therefore, be allowed so to tie the hands of his government that it would be estopped from taking action to uphold the supremacy of international law. The purpose of the clause in the present contract was not to deprive the claimant of his American citizenship or the rights which such citizenship implies, among them his undoubted right to apply to his own government for protection if his recourse to Mexican tribunals or other authorities resulted in denial or delay of justice, as that term is used in international law. Its only purpose was to bind the claimant to be governed by the laws of Mexico and to make use of the remedies which they provided. In accepting the Calvo provision he merely waived his right to act as if there were no competent authorities in Mexico, or as if he were engaged in fulfilling a contract in a country subject to a régime of capitulations, or as if the only remedies available to him were international remedies. All those he had a lawful right to waive, and having done so voluntarily, he was estopped from appealing to an international tribunal. The notion that a citizen who waives such privileges limits the sovereignty of his own country, said the commission, "belongs to those ages and countries which prohibited the giving up of his citizenship by a citizen or allowed him to relinquish it only with the special permission of his government." The commission held that the claimants in this case had accepted the Calvo clause in order to procure the contract, after which they never sought redress through the remedies provided by Mexican law and probably never had any intention of observing its provisions. They had no claim for denial or delay of justice or for any other violation of international law on the part of Mexico. Had there been such a claim and its validity established, the commission stated that it would have had no hesitation in taking jurisdiction and pronouncing the clause null and void. There being none such, they had no right to seek the interposition of their government.

This decision is in accord with the general jurisprudence of arbitral commissions in previous cases involving jurisdiction of claims arising out of contracts containing the so-called Calvo clause.¹

¹ The jurisprudence is analysed by Ralston in his *Law and Procedure of Arbitral Tribunals* (revised edition, 1926) pp. 58 ff. The above case may be compared with that of the *Nitrate Railway Co., Ltd.* (an English company) against Chile (1903) where a majority of the commission, consisting of the umpire and the Chilean arbitrator, held that there was no principle of international law which forbids an alien from entering into contracts containing the Calvo clause and thereby renouncing his right to resort to diplomatic intervention of his own government in case of differences arising between him and the concessionary government relative to the interpretation and execution of the contract. In this case the majority of the commission held that the claimant had renounced his right to invoke the diplomatic intervention of the British government or to appeal to an international tribunal. The English arbitrator, however, dissented on the ground that he could not accept the above views, that the terms of the claims

Nationality of claim—Admissibility of evidence before International Tribunal.

In the case of *William A. Parker*, claimant¹, the commission rejected the contention that when a government espouses a claim of one of its nationals against another government, the claim ceases to be a private one and that such espousal by either government before an international commission is *prima facie* evidence that the claim is impressed with the nationality of the espousing government. The commission held that espousal by the claimant's government gives it absolute and exclusive control of the claim, which control is exercised in the interest both of the private claimant and of "the whole people of the nation," but that the private nature of it is not lost or destroyed so as to make it the property of the nation. As to the nationality of the claim, that must be established by proof submitted in accordance with the convention and rules of procedure adopted by the commission. But the technical rules governing the admissibility and weight of evidence which apply in the procedure of municipal courts have no place in the procedure of international tribunals. The commission denied that there were in the procedure of the latter tribunals any rules governing the burden of proof, borrowed from municipal procedure. On the contrary, it held that it was the duty of the respective agents of the parties to co-operate in searching out and presenting to the commission all facts throwing any light on the merits of the claims presented. The parties before the commission being sovereign nations, they are in honour bound to make full disclosures of the facts in each case so far as such facts are within their knowledge, or can reasonably be ascertained by them.

Treatment of aliens, what constitutes an international delinquency?

Many of the cases before the commission involved liability of the state for damages on account of denials or delays of justice, lack of due diligence in apprehending and punishing culprits, acts of mobs, &c. In the case of *Neer*² the commission dwelt upon the difficulty of devising a general formula by which the convention did not preclude the submission of the terms of the claim to the commission and that its presentation to the commission was not a "resort to diplomacy." But in the later case of the *Antofagasta and Bolivia Railway Company* the majority of the commission as constituted at that time, including the umpire of the British commission, the Chilean arbitrator dissenting, recognized a limitation on the above-mentioned rule and sustained the jurisdiction of the commission to hear a claim presented by an English corporation in Chile, when the terms of the concession were somewhat different from those in the former case. The Chilean arbitrator, however, dissented on the ground that a clearer case of renunciation of diplomatic protection by the claimant could not be found. Compare also the decision of the umpire of the Italian-Venezuelan commission who held that an agreement between Italy and Venezuela to submit to the determination of a mixed commission all claims of Italian citizens against Venezuela had the effect of conferring jurisdiction on the commission to hear claims arising out of contracts, notwithstanding the renunciation by the claimant of his right to invoke the diplomatic protection of his government. (Ralston, *Venezuelan Arbitrations of 1903*, pp. 819, 841.) Compare also the decision of Umpire Plumley in the case of the *French Company of Venezuelan Railways* that an unrestricted agreement between France and Venezuela to submit to a mixed commission the question of damages suffered by Frenchmen in Venezuela might properly be considered, if necessary, as equivalent to a suspension of the Calvo clause in the contract where the damages arose out of the contract. (Ralston, *French-Venezuelan Mixed Claims Commission 1902*, p. 445.)

¹ Decided March 31, 1926.² Decided Oct. 15, 1926.

denial of justice may in every instance be determined. Without attempting to lay down a precise formula it expressed the opinion that the propriety of governmental conduct should be judged by international standards and that in order to constitute an international delinquency the treatment of an alien must amount to "an outrage, to bad faith, to wilful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency." Whether the insufficiency results from deficient execution of an "intelligent" law or from the fact that the laws of the country do not "empower the authorities to measure up to international standards" is immaterial.

In the case of *Faulkner*¹ the commission allowed an indemnity to a claimant who had been arrested and kept for some days in a Mexican house of detention under "intolerable circumstances of indignity and inconvenience." Applying the test of "international standards" adopted in the *Neer* case, the commission held that the treatment which he had received at the hands of the Mexican authorities constituted an "international delinquency" on the part of Mexico for which she was liable.

Delay in bringing to trial.

In the case of *Roberts*² the commission awarded the claimant an indemnity of \$8,000 because of unreasonable delay in bringing him to trial before a Mexican tribunal. He had been arrested on a charge of crime and kept in a filthy, unventilated and overcrowded prison for a period of nearly nineteen months pending investigation of the charges against him. The commission admitted that international law prescribes no definite standard for determining what is a reasonable period during which an accused person may be held under arrest before being brought to trial, but since the Constitution of Mexico provided that such a person must be judged within four months or a year, depending on the maximum penalty, the claimant had by the law of Mexico been unlawfully held without trial for at least seven months.

Measure of damages.

In the case of *Laura B. Jones et al.*³ the commission held that the Mexican authorities had been delinquent in failing to take proper measures to apprehend and punish the slayer of an American citizen. Regarding the measure of damages for such delinquency the commission admitted that it was more difficult of computation than the determination of the damage caused by the killing itself. It expressed the opinion, however, that "not only individual grief of the claimants should be taken into account, but a reasonable and substantial redress should be made for the mistrust and lack of safety, resulting from the government's attitude." The claimants were accordingly awarded an indemnity of \$12,000.

Due diligence in punishing perpetrators of mob violence.

Similarly in the case of *Youmans*⁴ Mexico was held liable for lack of due diligence in apprehending and punishing the participants in a mob, including a number of Mexican soldiers, which murdered two American citizens. Judicial

¹ Decided Nov. 2, 1926.

³ Decided Nov. 16, 1926.

² Decided Nov. 2, 1926.

⁴ Decided Nov. 23, 1926.

action had been taken against only 29 of the thousand or more persons who made up the mob. Some of the soldiers were arrested, but were not sentenced; five others were condemned to capital punishment, but their sentences were commuted; seven were acquitted; and seventeen of the prisoners escaped, some of them while at liberty on bail. The claimant was awarded \$20,000.

State liability for death of person in public custody.

In the case of *Quintanilla et al.*¹ the commission condemned the United States to pay a Mexican claimant an indemnity because of the failure of a deputy sheriff to account for a Mexican prisoner who was in his custody. While under arrest, and while being taken to jail, the prisoner was killed, whether by the deputy or by a mob it was never known. The commission laid down the principle that when an alien has been taken into custody by a public official the state is bound to account for him. It is therefore liable as much for its failure to do this as it is for cruel, harsh or unlawful treatment of him.

State liability for homicide by officer enforcing Government regulations.

A somewhat curious case was that of *Garcia and Garcia*² in which the majority of the commission held the United States liable for the act of an army officer in killing, apparently without intention, a Mexican child who was being rowed across the Rio Grande river on a raft at an unauthorized place of crossing. The officer was in command of a patrol charged with preventing smuggling and crossing of the river at such points. Under the American regulations, firing upon such persons was not authorized, but of these the officer professed to be ignorant. He had been tried by court martial and sentenced to dismissal from the army, but the President of the United States had reversed the findings and restored him to the army. The majority of the commission held the United States liable for the wrongful killing by one of its officials of the Garcia girl and awarded the claimant an indemnity. The only question under international law before the commission, it said, was whether the American officer "was entitled to shoot in the direction of the raft in the way he did." This depended on the answer to the question whether "there exists among civilized nations any international standard concerning the taking of human life." The majority of the commission thought there was not only such a standard, but that it was "necessary to state and acknowledge its existence, because of the fact that there are parts of the world and specific circumstances in which human practice apparently is inclined to fall below this standard." And it added: "If this international standard of appraising human life exists, it is the duty not only of municipal authorities but of international tribunals, as well, to obviate any reckless use of fire arms." This principle, in the field of international law, it was said, had been recognized in the Fourth Hague Convention of 1907, article 46 of which lays down the rule that in occupied territory "the lives of persons . . . must be respected." Shooting on the border by armed officials of either government could be justified only under certain conditions which were set forth in the opinion of the majority. In no sense could the use of fire arms with distressing results be sufficiently excused by the fact that there existed laws prohibiting the unauthorized crossing of the fron-

¹ Decided Nov. 16, 1926.

² Decided Dec. 3, 1926.

tier, that the enforcement of those laws was necessary and that the men who are charged with their enforcement are provided with fire arms. The American commissioner wrote a vigorous dissenting opinion in which he denied the liability of the United States in damages under international law for the act committed by a soldier under the circumstances.

J. W. GARNER.

NOTE

DECISIONS OF THE INTERPRETATION TRIBUNAL UNDER THE DAWES PLAN

The Tribunal of Arbitration for the decision of questions arising between the Reparation Commission and the German Government as to the interpretation of what is now generally known as the "Dawes Plan" has held two sittings, one in March, 1926, and one in January, 1927. The points at issue in each case were strictly confined to the text of the Plan and the awards of the Tribunal discuss no questions of general importance for students of international law.

At the first session in substance four separate questions were in issue, two of which—viz. whether the German obligations in respect of pensions to inhabitants of Alsace and Lorraine who had become French nationals, and the German obligation for the transfer of funds for social insurance to France and Poland, were included in the lump total of the Dawes Annuities—were decided in favour of Germany, and two—viz. whether the value of articles removed by Germany from an Allied country during the War and returned by way of restitution after the coming into force of the Dawes Plan was to be credited against the Annuities, and whether a credit against the Annuities was to be given for the German Government's obligation to pay for coal supplied by the British Naval Authorities to a German hospital ship during the Armistice—were decided in favour of the Reparation Commission.

At the sitting of January, 1927, a claim by Germany that the amounts payable by the German Government to its own nationals by way of compensation for private property liquidated in Allied countries—sums which the German Government alleged to amount to no less than £450,000,000—should be credited to her was decided in favour of the Reparation Commission.

A further arbitration is being instituted by the German Government on the point whether a credit against the Annuities is to be given for the value of property liquidated in Allied countries and credited to Germany, either in the Clearing Office accounts or otherwise, after the date when the Dawes Plan took effect.

The texts of the decisions of the 24th March, 1926, are given in full in the *American Journal of International Law*, Vol. XX, page 566, and that of the decision of the 29th January, 1927, at Vol. XXI, page 344, of the same journal.

DECISIONS OF NATIONAL TRIBUNALS INVOLVING POINTS OF INTERNATIONAL LAW

DIGEST OF THE DECISIONS OF THE ENGLISH COURTS DURING THE YEAR 1926

INTRODUCTORY NOTE ¹

IN the period under review there have been an unusual number of decisions of the English Courts on questions of international law, and not a few of them of the greatest importance. The *Fagernes* (1), *Sobhuza II v. Miller* (2) and *Jerusalem-Jaffa District Governor v. Suleiman Murra* (3), which deal respectively with the status of the Bristol Channel, a British protectorate and a British mandated territory, are cases of interest in the realm of public international law.

The decision of Hill J. in the *Fagernes* (1) that the Bristol Channel is within the jurisdiction of the English Courts as far west as a line from Bull Point to Port Eynon Head has already excited a certain amount of comment and will probably come shortly before the Court of Appeal.

Sobhuza II v. Miller (2) is a case which deals with the status of a British protectorate and of British protected persons in English law. The appellant sued the respondents for acts of trespass and the respondents justified such acts under orders and proclamations of the High Commissioner responsible under the Crown for the administration of the territory and under orders of the King in council. The Privy Council affirmed the decision of the Court in Swaziland that the action did not lie. The judgment does not, however, throw as much light on this obscure situation as one might have hoped. It is based upon two grounds : (1) the acts complained of were acts of state, and (2) they were justified under the Foreign Jurisdiction Act. It is not clear whether these two grounds are advanced as being alternatives mutually exclusive—a sort of dilemma (in which case no guidance is expressed as to which is the right one)—or whether they are cumulative.

The most important point decided in the case of *Jerusalem-Jaffa District Governor v. Suleiman Murra* (3) is that the jurisdiction exercised by the Crown in a mandated territory is from the point of view of English law jurisdiction under the Foreign Jurisdiction Act, i.e., jurisdiction which His Majesty by treaty, capitulation, usage or other lawful means exercises in a *foreign* country. It is also of considerable, though of more particular, interest that under the present constitution of Palestine the courts can declare void ordinances of the adminis-

¹ The numbers in brackets following the names of cases in the introductory note refer to the number of the case in the digest which follows. All cases reported in the 1926 Law Reports and contemporary reports are reviewed. One decision, however, of the House of Lords reported in the 1927 Law Reports but affirming a decision of the Court of Appeal reported in 1926, and one decision of the Judicial Committee of the Privy Council reported in 1925 but omitted from the review in the last number of the Year Book, are also included.

tration which are not consistent with the terms of the mandate, which has been thus made part of the law of Palestine.

The remaining cases which have to be considered come within the sphere of private international law. Perhaps the most important decisions of the past year are the three cases on domicile: *Bartlett v. Bartlett* (4), *The Attorney-General of Alberta v. Cook* (5) and *In re Annesley* (6).

The first of these (4) is a useful authority on the question what is the law of the domicile in the case of a person domiciled in a foreign country where his national state possesses extraterritorial jurisdiction.

The Privy Council decided that in the case of British subjects domiciled in such countries the law is that which the Crown has by Order in Council prescribed as applicable to the case in His Majesty's consular courts.

In *The Attorney-General of Alberta v. Cook* (5) the Privy Council has now decisively rejected the view that a married woman who was judicially separated from her husband might be independent of her husband in the matter of domicile. This view had the support of Westlake in his work on private international law. The domicile of a married woman remains that of her husband even if she is deserted by or separated from him. This case is, moreover, a decision on the question of domicile generally and applicable in matters of succession and all other matters and not merely to divorce.

In *In re Annesley* (6) we have an English decision on the question of the *renvoi*, a question of the greatest importance in the theory of private international law and a favourite topic of juridical speculation.

Russell J. held in the first place that the question where a person is domiciled must be decided by an English court exclusively with reference to the principles of English law respecting domicile and that the provisions of the law of a foreign country where a person is alleged to be domiciled with regard to the acquisition of domicile in that country are irrelevant. He found that the deceased Mrs. Annesley had acquired a domicile in France, although she had not taken the steps required by the French law for the acquisition of a domicile there by French law, and also held that the English court must distribute the estate of Mrs. Annesley exactly as a French court would do if the case came before it. The learned judge had then to arrive at a conclusion as to what law a French court would in the circumstances apply. He held that French law, in referring the distribution of this estate to the law of the deceased's nationality, meant the whole of that law, and, when the law of the nationality referred the matter back to French law, the French courts would hold that French law accepted the *renvoi* and would distribute the estate according to French internal law.

It is interesting to note that this doctrine corresponds exactly to the principles adopted in the law introducing the German civil code (1900, article 27, quoted by Westlake, 7th ed., p. 31).

The effect of the decision in the case of the *Republic of Guatemala v. Nunez* (7) can be most shortly explained by quoting two rules from Dicey's "Conflict of Laws," and amplifying and correcting them by the addition of the words in square brackets:

"Rule 153. An assignment of a movable which cannot be touched, i.e., of a debt, giving a good title thereto according to the *lex situs* of the debt, in so far as by analogy a *situs* can be attributed to a debt is [when made in the country where the debt is situated] valid."

"Rule 154. Subject to the exception hereinafter mentioned and to the very wide effect of Rules 152 and 153, the assignment of a movable [including debts] wherever situate, in accordance with the law of the owner's domicile or the place such assignment is made, may be presumed to be valid."

An assignment executed in Guatemala in accordance with English but not Guatemalan law of a debt situated in England between two persons domiciled in Guatemala was not recognized by the court.

The Court of Appeal have since affirmed the decision of Greer J., but the report of the judgment of the Lords Justices is not yet available.

The case of *Anderson v. Equitable Life Assurance Society* (8) is principally of interest as a decision of an English court as to the effect on debts payable in England in German marks of a decision of the German court to the effect that debts, whose value had depreciated with the mark, should be "valorized" as between creditor and debtor.

The decision of Duke P. in *The estate of White Todd* (9), where a will was required to be proved both in England and the United States, that a notarial copy might be filed in the Probate Registry in England and the original released for probate in the United States, provides a very useful means of getting over a practical difficulty which may arise not infrequently.

In the *Golaa* (10) Bateson J., on the ground that their institution was a breach of faith, set aside proceedings *in rem* against a ship which was arrested in the Thames under a writ issued by the plaintiffs in respect of the same matter, which had been the subject of proceedings in the United States and in which the plaintiffs had accepted bail and released the ship. In this case the proceedings in the United States were not in fact discontinued until over a week after the arrest in the Thames, so that the defendants had had to find bail twice over at the same time in respect of the same matter, but a passage is relied on from the judgment of Gorell Barnes J. in the *Mannheim* in which he states simply that a ship once released on bail cannot be arrested again in respect of the same matter at all.

The decision of the House of Lords in the case of the *Employers' Liability Assurance Corporation Ltd. v. Sedgwick, Collins & Co. Ltd.* (11) contains more than one point of general interest. In the first place the House again considered the effect of the nationalization decrees of the Russian Soviet Government—in this case the decrees relating to Russian insurance companies—and came to the conclusion that these decrees (as in the case of the nationalization decrees relating to Russian banks which the House had occasion to construe in a previous case)¹ did not have the effect of dissolving these companies, with the result that they ceased to exist, but had only put them into liquidation. Consequently the companies retained their corporate existence and maintained their title to property which had not been taken away from them by Russian legislation. The Russian legislation did not purport to deprive and in any event could not have the effect of depriving them of property situated outside Russian territory. In the second place this case is an important authority on the question of the recognition of foreign judgments. It was held that, if a company carries on or has carried on part of its business in a foreign country and the branch of the business in that country is put into liquidation and a liquidator appointed under an order of the local courts, any judgment which has been obtained in that country against the

¹ *Russian Commercial and Industrial Bank v. Comptoir d'Escompte de Mulhouse* (1925, A.C. 112): see *British Year Book of International Law*, 1926, p. 221.

company which the liquidator, although given an opportunity to dispute it, accepts as valid, ought under the rules of private international law to be recognized as a valid judgment anywhere.

The case of *Schintz v. Warr* (12)—a case dealing with service out of the jurisdiction—is another illustration of the fact that (though the rules under which the English courts may claim jurisdiction are extremely wide) the courts are most scrupulous in availing themselves of the wide discretionary power given them and apply fully the principle of *forum conveniens* in declining jurisdiction in favour of a foreign court. This is another case turning on Order XI, rule 1 (g). Service under this rule will not be allowed unless the relief sought against the party out of the jurisdiction falls genuinely within the scope of the action brought against the person within the jurisdiction. In another decision of the Court of Appeal on this same rule reviewed last year¹ it was held that service would not be allowed under this rule unless the relief sought against the person within the jurisdiction was itself a real and substantial cause of action.

The charge created under the Peace Treaties has produced a number of decisions on the locality of "choses in action." In *Baelz v. Public Trustee* (13) Eve J. held that shares in a company must be held to be situated in the country where the company is incorporated and not in the country where it carries on business or is resident for income tax purposes.

1. *The Fagernes*. 1926 P. 185 (Hill J.).

In March, 1926, a collision took place in the Bristol Channel between the *Cornish Coast*, whose owners were the plaintiffs, and the *Fagernes*, owned by the defendants, an Italian corporation carrying on business in Genoa. The *Fagernes* was sunk. The *Cornish Coast* was injured. The plaintiffs alleged that the cause of the accident was the negligence of the *Fagernes*. If proceedings were brought in England the plaintiffs had the possibility of recovering damages limited to £8 a ton. If they were brought in Italy the damages would be limited to the value of the *Fagernes*, which was on the bottom of the sea.

The plaintiffs' claim was clearly within the jurisdiction of the Admiralty Division of the High Court under section 22 of the Supreme Court of Judicature (Consolidation) Act, 1925, wherever the collision took place, as being one for damage received by a ship and damage done by a ship. Nevertheless, the plaintiffs, being unable to take proceedings *in rem* against the ship and compelled to proceed *in personam* against the defendants, who were in Italy, had to obtain leave to serve a writ out of the jurisdiction and for this purpose to bring their case under one of the rules of Order XI. Leave was granted under Order XI, rule 1 (ee), which allows leave to be granted when "the action is founded on a tort committed within the jurisdiction." The defendants appeared conditionally and applied to set aside the order on the ground that the collision did not take place within the jurisdiction.

There was no material difference between the parties as to the actual spot at which the collision occurred. It was at a spot where the channel is about 20 miles across—10½ miles from the English coast at Ilfracombe and 9½ from Wales at Oxwich Head.

Hill J. held that this spot was "within the jurisdiction" of the Court. The learned judge said that the question in this case was whether the place of the collision was situated "in a bay, gulf or estuary *inter fauces terrae*" which by the common law of England was within the body of a county—the case so carefully distinguished by Cockburn C.J. in *R. v. Keyn*. There was very little authority relevant to such a sea as the Bristol Channel where it is 20 miles wide. One set of cases, including *R. v. 49 Casks of Brandy*, relates to bays with a narrow opening, like Plymouth Sound, where no doubt could be entertained. In another set the decision was based either upon statutory recognition of a particular bay as within the territory or an international recognition of

¹ *Rosler v. Hilbery* (No. 19), 1925, 1 Ch. 250.

the fact. The Privy Council in *Direct U.S. Cable Co. v. Anglo-American Telegraph Co.*, where the question was as to the territorial dominion over Conception Bay (Newfoundland), relied upon both. The only authority was the passage from Lord Hale "*De Jure Maris et Brachiorum Ejusdem*" (Hargrave's Law Tracts, 1787, 1, cap. IV, p. 10), *R. v. Cunningham* (Bell C.C. 72) and the discussion but not the decision in the Conception Bay case. Lord Hale says: "That arm or branch of the sea, which lies within the *fauces terrae*, where a man may reasonably discern between shore and shore, is, or at least may be, within the body of a county and therefore within the jurisdiction of the sheriff or coroner." It was possible on a clear day to see across the Channel in a line west of the point under discussion, but there was no authority defining what was meant by "seeing or discerning" and whether it meant from the cliff or from the beach or what degree of visibility might be assumed.

In *Cunningham's* case it was held that a crime committed on board an American ship in Penarth Roads was committed within the county of Glamorgan. Penarth Roads are in the Bristol Channel above Lavernock Point, where the width is $7\frac{1}{2}$ miles, and lie between certain small islands called the Holms and the coast of Glamorgan. It was said in that case: "The whole of this inland sea between the counties of Somerset and Glamorgan is to be considered as within the counties by the shores of which its several parts are respectively bounded."

The learned judge then quoted at length from the Conception Bay case and said: "As were the opinions of jurists and text writers in 1877, so are they now [sc. there is no definite rule generally agreed to]. "There is, perhaps, a tendency in recent years to regard ten miles as the maximum width at which internal waters should begin. But this is mainly based on a number of conventions chiefly relating to fishing wherein by international agreement ten miles has been taken as the limit." He then quoted from the award in the North Atlantic Coast Fisheries Arbitration and the article by Sir C. Hurst in *The British Year Book of International Law* on the Territoriality of Bays, and concluded as follows: "I return to the common law with a regret that the Judicial Committee was not obliged to decide the point in the Conception Bay case. My guide is *Cunningham's* case. What did the Court mean by 'the whole of this inland sea between the counties of Somerset and Glamorgan'? The place in question was, it is true, above Lavernock Point, but the words used do not limit the inland sea to parts above Lavernock Point. And if the waters above Lavernock Point are within the *fauces terrae* I see no reason why the same is not true of the waters above a line drawn from Nash Point to the Foreland or the waters above a line drawn from Bull Point to Port Eynon Head. For the purposes of this case I need go no further."

2. *Sobhuza II v. Miller and Others.* (P.C.) 1926 A.C. 518.

Appeal from the Special Court of Swaziland.

Swaziland lies to the east of the Transvaal, between that country and the coast. It was an independent native state under the rule of native kings. Under the terms of a convention of 1894 between the South African Republic and Great Britain it was recognized as a protectorate administered by the Republic, which was declared to have all rights of protection and jurisdiction over the territory and its inhabitants, subject to the condition that certain rights of the natives were guaranteed, in particular those connected with grazing and agriculture. On the annexation of the South African Republic at the end of the Boer War, the Crown by Order in Council in 1903 (under the Foreign Jurisdiction Act, 1890) declared that all rights of the South African Republic had passed to His Majesty, and the Governor of the Transvaal (by a subsequent Order in Council the High Commissioner for South Africa was substituted for the Governor) was empowered to provide for the peace, order and good government of Swaziland by proclamation, but so as to respect any native laws by which the civil relations of any native chiefs, tribes or populations were regulated.

In 1889 Umbandine, king and paramount chief of the Swazis, by a concession to two persons, Thorburn and Watkins, for fifty years, granted agricultural and grazing rights on the unoccupied portions of certain land known as Farm 188, subject to all native rights therein. The appellant was the grandson of Umbandine and King of the

Swazis. The respondents were the persons to whom Thorburn and Watkins transferred their concession.

In 1907 by another Order in Council under the same Act it was provided that lands in Swaziland which had been made the subject of concessions by the paramount chiefs should be divided up and part thereof allocated to the exclusive use and possession of the natives and declared Crown lands, and the remainder should be vested in the High Commissioner and leased to the European holders of such concessions. By proclamations under the said order and notices thereunder this concession was expropriated and one third allotted to the natives and the remainder was granted in compensation to the concessionaires under a proclamation of 1917. The natives were thereupon ejected from portions of the land in the area granted to the respondents of which they had formerly been in occupation.

The appellant claimed for trespass by the respondents in so doing and restoration of the natives in their former rights.

It was argued on his behalf (1) that the Crown only possessed in the territory such rights as had been possessed by the South African Republic under the convention of 1894, which guaranteed native agricultural and grazing rights; (2) that the Foreign Jurisdiction Act did not apply; (3) that these rights had been confirmed by the Order in Council of 1903 and that they could not be taken away by the Crown by the subsequent Order of 1907.

The Privy Council affirmed the judgment of the Special Court of Swaziland dismissing the claim. The judgment was based on two alternative grounds.

(1) The actions of the Crown complained of done in Swaziland in relation to the natives were acts of state unchallengeable in any British court.

(2) The Order in Council, 1907, was valid under the statutory powers given to the Crown by the Foreign Jurisdiction Act which provides that it is lawful for the Crown to exercise any jurisdiction which it possesses in any foreign country by treaty, capitulation, grant or usage as if that jurisdiction had been acquired by conquest or cession of territory. The Foreign Jurisdiction Act makes jurisdiction acquired by the Crown in a protected country indistinguishable in legal effect from what might be acquired by conquest. The Crown cannot by statute deprive itself of freedom to make Orders in Council, even such as are inconsistent with previous Orders.

3. *Jerusalem-Jaffa District Governor v. Suleiman Murra.* (P.C.) 1926 A.C. 321.

On appeal from the Supreme Court of Palestine.

By the mandate for Palestine approved by the Council of the League of Nations acting under Article 22 of the Covenant of the League, the administration of Palestine is entrusted to His Britannic Majesty.

Article 2 of the Mandate provides: "The Mandatory shall be responsible for placing the country under such political administrative and economic conditions as will secure the establishment of the Jewish National Home, as laid down in the Preamble, and the development of self-governing Institutions, and also for safeguarding the civil and religious rights of all the Inhabitants of Palestine, irrespective of race and religion."

Under the Palestine (Amendment) Order in Council of 1923 the High Commissioner for Palestine is authorized to promulgate such ordinances as might be necessary for the peace, order and good government of the country, provided that such ordinances should not be repugnant to or inconsistent with the provisions of the mandate.

The High Commissioner promulgated an Ordinance under which the appellant was entitled to take, for the purpose of supplying Jerusalem with water, the water of certain springs which were the private property of the respondents, under certain conditions safeguarding the needs of the owners and providing for compensation if they suffered any damage by reason of such action.

The appellant proceeded to take action under the ordinance and the respondents applied for an injunction to restrain him from interfering with their property and rights. The Supreme Court of Palestine granted the injunction, holding that the ordinance was void as being repugnant to Article 2 of the mandate on the ground that the ordinance was an interference with the civil rights of the respondents without providing for full compensation.

The Palestine (Appeal to Privy Council) Order in Council of 1924 provides that appeals shall lie to the Privy Council from the Supreme Court of Palestine sitting as a Court of Appeal. This case was heard by that Court in first instance sitting as a High Court.

The appellant obtained special leave to appeal, "all questions as to jurisdiction being left open."

The Judicial Committee were of the opinion :

(1) That appeals lie from the Supreme Court of Palestine to the Privy Council, on the ground that the jurisdiction exercised by His Majesty under the mandate of the League of Nations in Palestine was jurisdiction possessed by His Majesty "in a foreign country" by "treaty, capitulation, grant, usage, sufferance or other lawful means," and came under the Foreign Jurisdiction Act. [This means that the Supreme Court of Palestine is deemed to be a British Court in a foreign country. Appeals lie from such British Courts to the Privy Council either by grant (e. g. express provisions in an Order in Council) or in other cases by special leave.]

(2) That the Supreme Court were justified under the Order in Council of 1923 in entertaining an argument as to the validity of the ordinance based on Article 2 of the mandate, but Article 2 of the mandate did not mean that all civil rights of the inhabitants of Palestine must remain unaltered throughout its duration, for, if that were so, effective legislation would be impossible, nor did it mean that in any case of expropriation for public purposes full compensation must be paid, for the payment of compensation in such cases was not a question of "civil rights." It was a matter which was governed by the principles of justice and of sound administration, and it was not the duty of the Court to decide whether the ordinances conformed to those principles.

(3) That in fact the compensation awarded under the ordinance was full compensation.

4. *Bartlett v. Bartlett.* (P.C.) 1925 A.C. 377.

On appeal from H. B. M. Supreme Court for Egypt.

The testator, a Moslem British subject domiciled in Egypt, by his will drawn up in English form left all his property to his widow and children. He was survived by his mother and two brothers. On the death of his mother his brothers claimed that they were each entitled to shares of one eighteenth of the testator's property under the Moslem law of inheritance as heirs of their mother who by Moslem law was one of the twelve sharers and entitled in this case to one sixth of the property, and that the testator could not dispose by will of his mother's heritable share.

It was contended on behalf of the brothers that Moslem law must be applied to the case, since the deceased and all the interested parties were Moslems, by virtue of the proviso to Article 90 of the Ottoman Order in Council, 1910 (which was continued for Egypt by the Egypt Order in Council, 1915). This proviso reads: "In all matters relating to marriage, inheritance or other questions involving religious law and custom, the Court shall in the case of persons belonging to non-Christian communities recognize and apply the religious law or custom of the person concerned." The correctness of the statement of Moslem law was unchallenged.

The Supreme Court for Egypt held that the testator as a British subject had a right under the Wills Act, 1837, to dispose of his property by will and that no Order in Council could take away that privilege, and that therefore, in spite of Article 90 of the Order in Council and of Moslem law, the testator, as a British subject, could dispose of all his property by will and, in so far as Article 90 attempted to do so, it was void for repugnancy under Section 12 of the Foreign Jurisdiction Act, 1890. The Court held, however, that that Article did not apply to cases where the deceased had made a will and consequently that the case did not come within its terms and rejected the claim of the brothers, holding that the deceased had validly disposed of all his estate by will.

The brothers appealed, and the Privy Council reversed this decision on the grounds :

(1) That the Wills Act, 1837, did not purport to give any right to dispose by will to any person of any property of which he had no capacity to dispose by any foreign law which was applicable to the case. No question of repugnancy therefore arose.

(2) That the law which governed dispositions of immovables was the *lex loci rei sitae* and of foreign movables the law of the domicile, and that in the case of a British subject

domiciled and possessing real property in Egypt the *lex loci rei sitae* and the law of the domicile were (as Articles 77 & 78 of the Egyptian Mixed Civil Code show) that law which the Crown has by Order in Council prescribed for His Majesty's Consular Courts in Egypt.

(3) That the claim of the appellants did come within Article 90, since it was a claim to "inheritance" and the word "inheritance" could not be construed as restricted to inheritance on intestacy.

(4) That Moslem law must be applied to the distribution of this estate.

5. *Attorney-General for Alberta v. Cook.* (P.C.) 1926 A.C. 444.

The respondent, Mrs. Cook, married her husband in 1913 in the Province of Ontario in the Dominion of Canada. In 1922 she instituted in the Supreme Court of the Province of Alberta in the Dominion of Canada proceedings for a divorce. It was assumed for the purposes of the appeal that both parties were at the time of the proceedings resident in Alberta. In 1921 the respondent obtained in Alberta a degree of judicial separation. At the hearing of the suit for divorce it was found that the domicile of origin of the husband was in Ontario and that he had never acquired another domicile, and that if the respondent could in law acquire a separate domicile from that of her husband the facts warranted the Court holding that she had become domiciled in Alberta and granting a decree for a divorce.

The laws of England as to divorce, established by the Matrimonial Causes Act, 1857, are applicable in Alberta, and the Supreme Court has jurisdiction to grant decrees of divorce.

The trial judge, Walsh J., dismissed the suit for a divorce on the ground that so long as the married state continues the domicile of the wife is that of her husband, and the matrimonial domicile not being in Alberta the Courts of Alberta had no jurisdiction.

On appeal from this decision to the Appellate Division of the Supreme Court of Alberta, the Attorney-General of Alberta intervened because of the general importance of the legal question involved. The decision of the trial judge was reversed by a majority of opinions.

On appeal from the Appellate Division, the Privy Council advised that a decree of judicial separation does not enable a wife to acquire a domicile different from that of her husband, and she could not sue for divorce in a Court other than that of her husband's domicile, and that the judgment of the Appellate Division should be reversed and that of Walsh J. restored.

It was contended on behalf of the respondent that the identity of the domicile of a wife with that of her husband is merely a legal fiction or presumption of law; that domicile depends on the capacity in law of individuals to choose a permanent home; and that when this capacity exists in a wife by reason of judicial separation and has in fact been exercised the rights arising from domicile exist in her favour.

The Privy Council considered the effect of a decree of judicial separation under the Matrimonial Causes Act. It is provided by sections 7 and 16 of that Act that such a decree shall have in the first place all the effect that a decree of divorce *a mensa et thoro* in the Ecclesiastical Courts formerly had. It was held that "it is difficult to find in the decree of divorce *a mensa et thoro* anything more in point of operative effect than a licence to the wife which protects her from a suit for restitution of conjugal rights."

Sections 25 and 26 of the Act further provide that in a case of judicial separation a wife shall be considered as a *feme sole* with respect to all property which she may acquire or which may devolve upon her and for the purposes of contract or wrongs done to her or by her and of suing or being sued in any civil proceedings.

The Privy Council held that the effects of a judicial separation are limited precisely to the matters expressly provided in the Act and that subject thereto all the effects of the pre-existing relationship of husband and wife continue.

While the above reasoning appears to be the principal ground of the decision, the judgment observes that the fact that the husband and wife could possess different domiciles and that a divorce could be obtained under different systems of law by spouses domiciled in different jurisdictions is irreconcilable with the existence of any axiom of private international law that there is in the case of every marriage one sole jurisdiction in which the dissolution of the marriage can be decreed, and in this connexion the

judgments of Lord Haldane and Lord Shaw in *Lord Advocate v. Jaffrey* (1921 1 A.C. 146 at pp. 152 and 168) to the effect that a husband and wife while they continue married can only have one domicile—that of the husband—are quoted and to some extent relied upon.

Three subsidiary points of some interest and importance were considered in the judgment in this case :

(1) It was pointed out that the question which had been considered in *Armitage v. Armitage* (1898, P. 178 at p. 185) in the Divorce Court—namely “whether without express legislative sanction courts having jurisdiction in divorce may by estoppel or like device ensure that one of the spouses shall not resort to a jurisdiction other than that in which both were domiciled and invoke its powers on the ground of domicile newly acquired within its authority to change the status of the spouses left resident in the original place of domicile”—was not directly raised in this appeal and that the Privy Council were not required to deal with it on this occasion.

(2) Since the Privy Council were of the opinion that a wife separated from her husband could not acquire a separate domicile, they did not have to decide whether, assuming that she could do so, the courts of her new domicile would have jurisdiction to dissolve her marriage with a husband domiciled elsewhere. The New Zealand case was, however, quoted, *Hastings v. Hastings* (1922 N.Z.L.R. 273), where the court having held that the wife had acquired a separate domicile in New Zealand dismissed the suit because “the husband for want of domicile owed obedience to this court.”

(3) The point was raised in the appeal whether for purposes of divorce it should be held that there was throughout the Dominion of Canada one Canadian domicile, and that rights dependent on domicile within the Dominion could be determined in any court having jurisdiction locally over the subject-matter. The Privy Council were of the opinion that this proposition could not be established and rested their opinion mainly on the ground that there was not uniformity but diversity of law in the different provinces of Canada in the matter of divorce.

6. *In re Annesley*. 1926 1 Ch. 692 (Russell J.).

The deceased, Mrs. Annesley, whose estate formed the subject of this action, died in France in 1924. She had been a widow since 1884 and had lived in France ever since that date. In 1897 she bought a château near Pau which had been her residence from that time till her death. There was evidence which the Court accepted that it had been her intention to reside in France till she died.

She did not, however, take the steps prescribed by Article 13 of the French Civil Code to obtain a French domicile according to French law, and she stated in her will that it was not her intention to abandon her domicile of origin, namely England. She died possessed of immovable property in France and personal property in France and England.

In 1919 she executed a will in English form in which she purported to dispose of all her property movable and immovable. The question was whether the distribution of her estate must be governed by English or French law. If it was governed by French law, the deceased would only be able to dispose of one third of her personal property, because she left two children surviving her : if it was governed by English law, she could dispose of the whole of her property by will.

Russell J. held :

(1) that the question whether Mrs. Annesley had acquired a domicile in France must be answered exclusively with reference to the requirements of English law for the acquisition of domicile—namely the fact of residence and the intention to remain there for an unlimited time ;

(2) that it was a requirement of English law for the acquisition of a domicile in a foreign country that a domicile should be acquired there according to the law of that foreign country, and that therefore it was irrelevant that the deceased had not fulfilled the formalities required in order to acquire the status of a domiciled Frenchwoman by French law (*In re Martin*, 1900, P. 211 and other cases followed, and *In re Johnson*, 1903, 1 Ch. 821 not followed) ;

(3) that Mrs. Annesley had acquired a French domicile by residence, and her intention to reside indefinitely in France, and her declaration of intention in her will, though

an element which must be weighed in arriving at a decision on the question of domicile, could not suffice to upset the conclusion which clearly emerged from the other relevant facts ;

(4) that, as the testatrix died domiciled in France, English law required that her estate should be distributed in accordance with those principles which a French court would apply to the case ;

(5) that (upon the evidence of the French law before him) it appeared (i) that, since Mrs. Annesley had not become by French law a domiciled Frenchwoman, French law required that her estate should be distributed in accordance with the law of her nationality (English law), and (ii) that the French courts, upon its being found that the law of her nationality referred the matter to the law of the domicile (French law), would distribute the estate in accordance with French municipal law ;

(6) that French municipal law must be applied to the distribution of this estate.

7. *Republic of Guatemala v. Nunez.* 42 T. L. R. 625 (Greer J.).

In 1898 one Cabrera became President of Guatemala. In 1906 he caused to be paid to his credit with Lazard Brothers, bankers in London, the sum of £21,800, which was the subject of the action. In April 1920 he was deposed from the office of President and was kept a prisoner in Guatemala by his political rivals until his death in prison in 1924. The Republic, the plaintiffs, claimed the money from Lazard Brothers on the ground that the money was part of the public funds of the Republic, which Cabrera had attempted to misappropriate. In support of this contention a communication was relied on, dated July 12, 1921, signed by Cabrera and addressed to Lazard Brothers, ordering them to transfer this sum to the credit of the Republic as being the "public funds of the nation." This communication was conveyed to Lazard Brothers on August 10, 1921, by the Guatemalan consul in London. It was confirmed by a subsequent communication signed by Cabrera which was produced by the consul on October 11.

Lazard Brothers, having received claims to the money on behalf of the defendant, obtained leave to interplead and, on the money being deposited in Court, were released from the action. The defendant Nunez was made defendant in the action. He was an illegitimate son of the ex-President and claimed that the money had been given to him, and he relied upon a letter, signed by Cabrera, dated July 24, 1919, and addressed to Lazard Brothers, transferring the money to him, as an assignment of the debt owing by Lazard Brothers to Cabrera. Notice of this letter was received by Lazard Brothers on August 4, 1921.

The action being thus constituted by interpleader proceedings, in which both parties claimed a sum which had been held by Lazard Brothers for Cabrera as his private property and was now in court, the onus rested equally on both the plaintiffs and the defendant affirmatively to prove a right to the sum.

Greer J. dismissed the claims of both the plaintiffs and the defendant with costs, and the money was ordered to remain in court pending further proceedings.

In opposition to the plaintiffs' claim, the defendant contended with regard to both communications on which the plaintiffs relied (1) that they were not admissible as evidence at all ; (2) that Cabrera had been compelled to sign them under duress and in fear of his life. The learned judge held that both the document of July 12, 1921, and that of October 10, 1921, were admissible as evidence, on the ground that they were statements of Cabrera against his proprietary interest, and in this matter Cabrera was in the position of the defendant's predecessor in title. Nevertheless, though they were admissible, he could not attach any weight to them, since all their value as admissions was taken away by the circumstances in which they were made—when Cabrera was sick and a prisoner in the hands of his political opponents, and in the presence only of a member of the rival government, his gaoler and a notary. He held that the plaintiffs had failed to prove that the moneys standing to the credit of Cabrera at Lazard Brothers were public funds.

In opposition to the defendant's claim, the plaintiffs contended (1) that the letter of July 24, 1919, was not a genuine document at all and did not come into existence till a much later date ; (2) that in any event it was void as an assignment, since it did not fulfil the requirements of Guatemalan law with regard to donations, which required all contracts or promises to transfer any kind of property (over \$100 in value) to be made by deed before a notary public and on stamped paper.

Greer J. held :

(1) that the letter was a genuine document which had been signed by Cabrera before July 21, 1921, though possibly not on the date which it bore ;

(2) that the letter was a good assignment in English law, but was void by Guatemalan law ;

(3) that Rule 153 of Dicey's *Conflict of Laws*, which states that an assignment of a debt giving a good title thereto according to the *lex situs* of the debt is valid, is too widely stated, is not supported by any authority and is contrary to *Lee v. Abdy* (17 Q.B.D., 309) ;

(4) that it would be inconsistent with international comity to hold that a transfer made in a foreign country between two citizens of that country domiciled there should be valid as between the transferor and transferee merely because it was in accordance with English law.

8. *Anderson v. Equitable Life Assurance Society of the United States.* 42 T.L.R. 123 & 306. 134 L.T.R. 557 (Acton J. and C.A.).

The defendant Society in 1887, when they were carrying on an insurance business in England and in Germany as well as in the United States, issued to the husband of the plaintiff an insurance policy on his own life by the terms of which the Society, in consideration of the payment of certain premiums in Reichsmarks at their London office, undertook to pay to the plaintiff on the death of her husband, at their London office, the sum of 60,000 Reichsmarks, together with all surplus profits derived from the said policy in accordance with the principles and methods adopted from time to time by the Society for their distribution, which principles and methods any person claiming under the policy was bound in advance to accept. It was further provided that the terms of the contract should be governed by English law. The policy became fully paid in 1907, but further profits under the policy accrued after that date. The plaintiff's husband died in 1922.

The defendant Society contended that they were entitled to pay the amount of the policy and the accrued profits in paper Reichsmarks, which in 1922 were almost valueless.

The three following alternative contentions were put forward on behalf of the plaintiff :

(1) that the contract was for payment of the sum assured in gold marks, and should be converted at the rate of 20·43 to the pound sterling ;

(2) that the sum payable in Reichsmarks must be valorized in accordance with the principles laid down by the German Reichsgericht at Leipzig for the payment of debts in Reichsmarks, which in the circumstances of this case would require payment at the rate of 20·43 marks to the pound sterling.

This latter contention was based upon the evidence given before the Court by Dr. Barandon, a German lawyer, which was uncontradicted.

Dr. Barandon said that paper marks had been made legal tender in Germany by a law of August, 1914. When the mark depreciated, the loss was at first borne by the creditor, till on November 23, 1923, the Supreme Court at Leipzig decided that Article 242 of the German Civil Code, which provides that every debtor has to make performance according to the principles of good faith and according to custom, did not permit a debtor who had incurred a debt in marks at the time when the value of the mark was at par to discharge that debt by paying the exact amount in marks at a time when they were of far less value, but required that the fair value of the debt as between debtor and creditor should be ascertained and paid ;

(3) that the defendant Society had elected to treat the contract as a gold mark contract and must be held to their election, or alternatively were by their conduct estopped from denying that it was a contract to pay in gold marks.

This contention was based upon the fact that the Society, in estimating their profits for the purposes of their distribution amongst the profit-sharing policies, had in every case calculated their liability on policies, on which payment had to be made in Reichsmarks on the basis of four marks to the dollar (or 20·43 to the pound sterling), and then, when the amount of the profits allocated to any policy payable in marks had been ascertained in dollars, this sum in dollars was converted into marks at this same rate.

Acton J. rejected the first and second contentions of the plaintiff on grounds

substantially the same as those adopted by the Court of Appeal. He accepted the third contention, however, and gave judgment for the plaintiff on that ground.

On appeal by the defendant Society, the Court of Appeal rejected all three contentions of the plaintiff and gave judgment for the defendants.

(1) With regard to the plaintiff's first contention, Bankes L.J. stated what he said was a well settled rule of English law in the following words :

"Where a person has entered into a commercial contract, which is governed by English law, and has undertaken to pay in this country a sum in a foreign currency, then the true construction of that contract is that, when the time comes for payment, the amount having to be paid in this country must be paid in sterling, but at the rate of exchange of the day when payment is due, applicable to the particular currency to which the contract refers."

He added that the terms of this policy stipulated for payment in Reichsmarks, not in gold Reichsmarks, and it had already been decided in *In re Chesterman's Trusts* (1923, 2 Ch. 466) that in such a case a stipulation for payment in gold Reichsmarks could not be implied.

(2) On the second point the Court of Appeal held that the decision of the Supreme Court at Leipzig did not affect the question of currency and did not declare the Reichsmark was not legal tender. It was a decision on a point of German law with reference to the performance of contracts ; consequently it had nothing to do with a contract which was to be performed in England and was governed by English law.

(3) On the third point the Court of Appeal held that there was no election because the company were entitled to estimate and distribute their profits in accordance with any policy which they adopted, and there was no estoppel because the method adopted of calculating their profits was not communicated to the assured and he had in no way altered his position by reason of that which the company did in this respect.

9. *In the Estate of White Todd.* 1926 P. 173 (Duke P.).

If testamentary papers are independent, one dealing exclusively with property within the jurisdiction and the other with property outside it, there is no obligation on a party propounding the first to obtain probate of the second. The question is whether the papers are independent or interdependent.

A testator left two wills, one English, the other American—the latter dealt exclusively with property outside the English jurisdiction—but provisions in the English will providing for the payment of all estate and legacy duties affected the property in the United States. The executors of the two wills were different persons. The testator expressly directed that the American will should be "probated" in America.

Held, that the two wills were interdependent, and that the two wills and a codicil to the English will should all be proved in England ; but that the document to be retained in the English Probate Registry as evidence of the testamentary act of making the American will should be an examined and sealed copy of that will, and after probate the original American will should be handed out to the executors named therein for probate in America.

10. *The Golaa.* 1926 P. 103 (Bateson J.).

In January, 1924, the plaintiffs instituted an action *in rem* in the United States in respect of damage done by the defendants' ship to some pipe lines belonging to the plaintiffs in the bed of the river at Tampico. The ship was arrested and released on bail being given by the defendants in the sum of \$28,000. The action proceeded in America, but on February 26, 1926, before it had been brought to trial, the plaintiffs issued a fresh writ *in rem* in this country, and on the 27th re-arrested the ship in the Thames. Later on the same day the plaintiffs' representative here cabled for the American proceedings to be discontinued. On March 4 the defendants served notice of motion to set aside the writ and all subsequent proceedings in the present action. On March 8 the American action was discontinued :

Held, that having obtained bail and so released the ship from any further claim in respect of the particular damage alleged, the plaintiffs' subsequent discontinuance of the action in America after the re-arrest here did not cure their breach of good faith in instituting proceedings in England and causing the ship to be arrested again ; and that the writ and all subsequent proceedings must be set aside.

11. *Sedgwick, Collins & Company v. Russia Insurance Company of Petrograd.*

Employers' Liability Assurance Corporation Ltd. (Garnishees). 1926 1 K.B. 1 (C.A.).

Employers' Liability Assurance Corporation, Ltd. v. Sedgwick, Collins & Company, Ltd. 1927 A.C. 95.

The Russia Insurance Company was a company incorporated by Russian charter, which carried on business in England before and during the war, and in 1917, in pursuance of section 274 of the Companies Act, 1908, filed with the registrar of joint stock companies in England the name and address of C. as a person resident in the United Kingdom authorized to accept service of process on its behalf. Under this section it is provided that in the event of any alteration in the name or address of such person the company shall file with the Registrar notice of alteration.

In November, 1918, the Russian Council of Peoples' Commissaries passed decrees declaring insurance business of all kinds to be a state monopoly, subjecting private insurance companies to liquidation and making the assets of such companies realized in liquidation state property. Neither the Russia company nor its liquidator in Russia ever filed any notice with the registrar under section 274 with respect to C., though in March, 1923, C. himself informed the registrar that he had no longer authority to accept service on behalf of the company "which had, by reason of the Russian legislation, ceased to exist as a separate entity."

In May, 1923, Sedgwick, Collins & Co. commenced proceedings against the Russia company by service of a writ on C., and in June, 1923, obtained judgment for £4,505 12s. 6d. in default of appearance. In December, 1924, as judgment creditors they obtained a provisional order (garnishee order nisi) against the Employers' Liability Assurance Corporation, who were alleged to owe money to the Russia Company, attaching all debts due from them to the Russia Company to answer the judgment.

On an application of Sedgwick, Collins & Co. to make the order final, subject to the trial of the issue of their liability to the Russia Company, the Employers' Liability Corporation appeared and opposed the application on the ground that, if the order was made and (in the event of its being found at the trial that they owed money to the Russia Company) they paid a sum to satisfy the judgment, there was danger that they might still be compelled in some foreign court again to pay the same sum to the Russia Company, since the judgment on which the proceedings were brought was obtained in default of appearance and would not be recognized in Russia or outside England.

The master declined to make the order absolute and the judge in Chambers (Fraser J.) refused to disturb the master's order. Sedgwick, Collins & Co. appealed to the Court of Appeal. After the date of the decision of Fraser J. and prior to the hearing in the Court of Appeal, an order was made in the Chancery Division for the winding up of the Russia Company, and the Official Receiver was appointed as liquidator. The Court of Appeal, before giving their decision, allowed the liquidator time to investigate the judgment of June, 1923, and the affairs of the company, and the liquidator informed the Court that he did not propose to dispute that judgment.

In these circumstances the Court of Appeal reversed that decision and made the order absolute, directing that an issue should be tried (Bankes and Sargent L.JJ., Scrutton, L.J. dissenting).

The House of Lords confirmed the decision of the Court of Appeal.

It is a clearly accepted principle of English law that the power to grant a garnishee order attaching debts due from a third party to the judgment debtor in satisfaction of the judgment debt is a discretionary one and will never be exercised in any case where there is any substantial danger, if the order were made, of the third party being called upon to pay again by reason of the judgment being impugned.

In considering this question it was held in both tribunals that it must be assumed that the courts of Russia and other foreign countries will proceed in accordance with the principles of international comity and will recognize any judgment of an English court which is an "effective" judgment (or in other words the judgment of a court of competent jurisdiction) in accordance with the rules of Private International Law.

The question, therefore, which had to be decided was whether the judgment of June, 1923, recovered by Sedgwick, Collins & Co. against the Russia Company, was such a judgment.

It was contended on behalf of the Employers' Liability Corporation that it was not on the ground that

(1) it was a judgment obtained against a corporation which was non-existent, since the Russian legislation of 1918 had put an end to the existence of the company ;

(2) it was obtained against a foreign company *in absentem* in circumstances where, by the rules of Private International Law, the English courts had no jurisdiction.

The House of Lords held :

(1) The Russian decrees respecting private insurance companies had not the effect of dissolving those companies but only put them into liquidation ; that, though a company which has been dissolved no longer exists as a corporate entity capable of holding property and of being sued, a company in liquidation retains its corporate existence (although the control of its affairs has passed to the liquidator) and retains its title to any property not taken away from it, including (in the present case) the property and rights of the company in countries foreign to Russia which are not effectively taken away from it by the Russian legislation. The company was capable, therefore, of being sued and of having judgment given against it.

(2) Though it is the general rule that a judgment, obtained in England against a foreign defendant not resident or present in England in an action in which he has not appeared, need not by the rules of Private International Law be recognized by foreign courts, that rule does not apply when the defendant has expressly or impliedly agreed to submit to the jurisdiction of the English courts. The Russia Company having, in accordance with the Companies' Act, put on the file the name of a person authorized to accept on its behalf service of any process, thereby submitted to the jurisdiction of the English courts, and consequently the judgment of the English courts should be recognized by foreign courts.

(3) That the liquidator of the company had admitted the validity of the judgment ; and since the validity of the order of the Chancery Division for the winding up of the company was undoubted so far as the British assets were concerned, and the power of a liquidator to admit a judgment debt was equally indisputable, no court could refuse to recognize a judgment whose validity the liquidator had admitted.

Lord Blanesburgh concurred in the first and third of these propositions, but dissented from the second. He argued (i) that before the creation of the statutory duty on the part of foreign companies to register the name of a person on whom service on behalf of the company might be made, service had been allowed to be made under the procedure of the English courts, in the case of a company actually carrying on business within the jurisdiction, on a principal officer of the company, and that such a method of service was still available and could be used (in particular) in the case of foreign companies which had failed to register the name of any person under Article 274 ; (ii) that all that Article 274 did and intended to do was to create a new convenient and facultative method of service, and that it was not intended to give the English courts jurisdiction in any case where they had not possessed it before and it should not be interpreted as doing so.

(4) Foreign courts would not be obliged to recognize a judgment obtained by default in England against a foreign company which had ceased to carry on business in England by means of the service of a writ upon a person who had neither *de jure* nor *de facto* any power to represent the company when the plaintiffs had express notice of this fact.

12. *Schintz v. Warr.* 1926 Ch. 710 (C.A.).

By the articles of a company, established in France according to French law, it was provided (*inter alia*) that "any dispute which may arise during the existence of the company, whether between the company and its shareholders or among the shareholders themselves, respecting the affairs of the company must be submitted to the Commercial Court at Douai." The plaintiff, who was a trustee of, and also entitled to a life interest under, a settlement by which a large number of the shares of the company were settled, brought an action against her co-trustees for breach of trust in voting without her authority in favour of a resolution of the company to capitalize part of its reserve fund and for damages. She also claimed a declaration that the resolution was invalid, and for that purpose joined the company as a co-defendant.

She subsequently obtained an order giving her leave to issue a concurrent writ, and

to serve notice thereof upon the company out of the jurisdiction on the ground that the company was a necessary and proper party to the action within Order XI, r. 1 (g). The company entered a conditional appearance, and moved to discharge the order on the ground that it was not domiciled or ordinarily resident within the jurisdiction and was not a necessary or proper party to the action.

Lawrence J. dismissed the application. On appeal :

Held : (1) that the company were not necessary or proper parties to the action within the meaning of Order XI, r. 1 (g), for the reasons :

(a) that the plaintiff's claim in the action was primarily whether the trustees acted without authority of the plaintiff and in breach of their duty as trustees and for damages for such breach ;

(b) that the resolution of the company must stand as valid until it had been shown to be invalid, and the plaintiff would be entitled to damages on this footing, and it would be for the defendants to prove the invalidity of the resolution in mitigation of damages, if they wished to do so ;

(c) that the claim for a declaration that the resolution was invalid was entirely outside the scope of action ;

(d) the company were not interested or concerned in the amount of damages recovered by the plaintiff ;

(2) that, in view of the fact that under the articles of the company the plaintiff and all other shareholders had contracted to submit this question to a particular tribunal, an English Court would decline to entertain this question at all, and, so far as this question was concerned, the *forum conveniens* was the commercial tribunal at Douai.

13. *Baelz v. Public Trustee*. 1926 1 Ch. 863 (Eve J.).

The plaintiff Baelz was at all material times a German national resident in Germany. On January 10, 1920, he was the beneficial owner of certain shares, standing in the name of his late father in the books of a trading corporation, Arnold J. van den Bergh, Ltd. The defendant, as custodian of enemy property in Great Britain, had received dividends on the shares. The plaintiff sought a declaration that these shares and the dividends which had accrued thereon were not on January 10, 1920, "property, rights or interests within the territory" of Great Britain, and therefore were not subject to the charge created by the Treaty of Peace Act, 1919, and the Treaty of Peace Order in Council, in accordance with Article 297 (b) of the Treaty of Versailles.

Arnold J. van den Bergh, Ltd. was a company registered in England under the Companies' Acts, with limited liability, in 1907. In 1909 the company's articles were modified so as to provide that the meetings of the members and directors should be held in Holland and the whole of the administrative business of the company was from that date carried on from or in Holland by directors resident in Holland. The company had been treated for income-tax purposes as "resident" in Holland. The company's register of members was kept at the registered office situate in England.

The question was, therefore, whether the shares must or must not be deemed to be situated in England.

It was argued on behalf of the plaintiff that the locality of the shares must be determined with reference to the place where the company was held to be "resident" or domiciled, i. e. the place where the company carried on business, and Dicey's *Conflict of Laws*, Rule 19, was quoted :

"The domicile of a corporation is the place considered by law to be the centre of its affairs, which in the case of a trading corporation is its principal place of business, i. e. the place where the administrative business of the corporation is carried on."

It was held, however, that these shares must be held to be locally situated in England and were subject to the charge. Eve J. in coming to this conclusion relied upon the fact that "for the contributory's title to his shares, his status as a shareholder and the enforcement of his rights, recourse must be had to the statutory register, which remains localized at the registered office, and to the English court, with which alone, under section 23 of the Companies' (Consolidation) Act, 1908, abided the power to rectify the register." He held that decisions as to the position of shares as a source of income for income-tax purposes, in which the position of shares had been held to be at the place where the company carried on its business (*Bradbury v. English Sewing Cotton Co.* 1923 A.C. 744 and other cases), were not relevant to the present question.

RECENT DECISIONS OF THE UNITED STATES SUPREME COURT INVOLVING QUESTIONS OF INTERNATIONAL LAW

Immunity of state-owned ships engaged in commerce.

On June 7, 1926, the Supreme Court of the United States rendered an important decision in which, for the first time, it passed on the question of the immunity from arrest and libel *in rem* of a vessel owned by a foreign government and operated by it for the carriage of merchandise for hire. The inferior federal courts had at various times since the close of the World War passed upon the question, but their decisions had not been uniform, some upholding the rule of immunity, others denying it.¹ In the case of the *Pesaro*² Judge Mack of the United States District Court for the Southern District of New York had held that a steamship owned and operated by the Italian Government as an ordinary merchant vessel and engaged in carrying passengers and cargo for hire was not exempt from arrest or process in the admiralty courts. In a learned opinion he criticized the extension of the rule of immunity to cover state-owned ships employed as ordinary commerce carriers, because it deprived parties injured by the operation of such vessels of their well-established legal remedies and relieved the government of liabilities to which privately-owned competing merchant vessels were subject.

It is this decision which the Supreme Court has now overruled.³ The Court affirmed the principle that a foreign state-owned vessel employed as an ordinary commerce carrier is entitled to the same immunity from arrest under process based on a libel *in rem* by a private suitor as is a warship or other public vessel. It relied mainly on the old American case of the *Exchange* (7 Cranch 16) and the later English case of the *Parlement Belge* (L.R. 5 P.D. 197). Although the question at issue in the *Exchange* was the immunity of a *war* vessel, the Court held that the decision upholding such immunity was equally applicable to a state-owned vessel engaged solely in the carrying trade, especially when, as in the present case, the purpose of the business was to earn revenue for the state and promote its economic interests. The present case differed also from the *Parlement Belge* in that the latter vessel was manned by officers of the Belgian navy and was employed primarily as a mail-packet and only secondarily as a carrier of merchandise and passengers.

This decision of the Supreme Court settles the matter so far as the United States is concerned, and the principle now affirmed is in harmony with the jurisprudence of the English courts,⁴ but it is contrary to the opinion of many jurists to-day, to the conclusions of the International Maritime Committee, and to the recommendations of the Committee of Experts on the Progressive Codification of International Law. The decision will be regretted by those who feel that the natural distinction between the two classes of state-owned vessels should be recognized and a different rule applied in respect to their immunity. Under the decision of the United States Supreme Court, if a vessel operated as an ordinary commerce carrier must be treated as a public vessel, merely because it

¹ Their decisions are reviewed in my article entitled "Immunities of State-owned Ships employed in Commerce" in this Year Book for 1925, pp. 128 ff.

² 277 Fed. Rep. 473.

³ *Berizzi Brothers Company v. the Steamship Pesaro*. Text in *American Journal of International Law*, Oct., 1926, p. 811.

⁴ The jurisprudence is summarized in my article cited above, p. 141.

earns revenue for the state and tends to increase its economic power, it is not easy to conceive of any vessel operated by the state as being other than a public vessel.

Seizure of enemy vessels at the outbreak of war.

In the case of *Littlejohn and Company v. The United States*,¹ decided March 1, 1926, the Supreme Court upheld the constitutionality of the joint resolution of Congress of May 12, 1917, authorizing the President "to take over to the United States the immediate possession and title" of any vessel within the jurisdiction thereof, belonging to an enemy of the United States. The vessel involved in this case was one of the numerous German merchantmen which, while refugeeing in an American port, had been seized by direction of the President after the entrance of the United States into the war and used by the Government for naval purposes. The appellants contended that, under the rules of international law as recognized by the United States, the seizure and confiscation of such vessels was not allowable. At most, they argued, they could only be detained and used in accordance with the Sixth Hague Convention of 1907, and they cited in support of their contention the jurisprudence of the British prize courts in the cases of the *Chile*, the *Blonde*, and others. The Court, however, pointed out that the United States was not a party to the Sixth Hague Convention and that the questions involved in the British cases invoked were different from the one here presented. It deemed unnecessary a consideration of the question of how far the ancient rules concerning confiscation of enemy property had been modified by recent practice. In the absence of a Conventional rule, belligerents were free to adopt such policy as they saw fit, and in authorizing the President to take "possession and title" of the German vessels Congress violated no commonly accepted rule of international law. The Court also intimated that, even if the resolution of Congress were in contravention of any such rule, it would be bound to follow the resolution since the "duly expressed will of Congress when proceeding within its powers is the supreme law of the land."

Effect of war on partnership between national and enemy.

In the case of *Sutherland v. Mayer*,² the Supreme Court held, following the traditional jurisprudence of the United States and Great Britain, that a declaration of war automatically dissolves a partnership between persons who, as a result, become enemies; that the loyal partner is entitled to an accounting as soon as communication between the enemy countries is resumed and that the accounting, in this case in German marks, should be reckoned on the basis of the value of the mark at the date when the resumption of such communication with Germany became effective under the War Trade Board regulation of July 14, 1919.

J. W. GARNER.

¹ 270 United States, p. 215.

² 271 U.S., 272.

REVIEWS OF BOOKS

Oppenheim's International Law, Vol. II, Disputes, War and Neutrality. Fourth Edition by Dr. A. D. McNair, C.B.E., LL.D. Longmans, Green & Co. v + 752 pp. (42s.)

A new edition of Oppenheim is an event. It is already five years since the third edition was published, and in the world of international law much happens in five years. Every new edition of a standard work means that more material must be included, and though here and there passages in the previous edition can be suppressed, the additions are bound to be considerable. In the present case there is a net addition of seventy-two pages as compared with Volume II of the third edition.

The difficult task of editing a well-known treatise has been admirably performed by Dr. McNair. Dr. Oppenheim's text has been preserved wherever it was possible, and it is unlikely that if he himself had been alive and able to produce this new edition he would not have introduced changes as great as, or even greater than, those made by Dr. McNair.

It is interesting to note that a substantial portion of the new matter which has been introduced is concerned with the work of the League of Nations and with the new machinery which the League provides, directly through the activities of the Council or of the Permanent Court of International Justice at The Hague, or indirectly through the encouragement which it has given to the process of Conciliation, for the amicable adjustment of disputes. In the compulsive settlement of state differences without resort to war, the part which the League may in the future be called upon to play is not at present so apparent, and is therefore not so fully treated in the new edition of Oppenheim, but the recent report of the committee of the Council on the means which Article 11 of the Covenant provides for putting pressure on a recalcitrant state shows a new field in which the League is likely in the future to render great service to the world.

Only the second volume of the fourth edition has so far been published ; the first, dealing with the law of Peace, of states in their normal relations, has not yet appeared. It is only now, however, that some of the new belligerent practices of the late war are beginning to be apprized correctly, and the new matter which Dr. McNair has introduced is, therefore, very interesting. On certain points we could have wished for fuller treatment. The belligerent seizure and censoring of mails on board neutral steamers, for instance, is a subject to which international lawyers must devote much attention in the future. No participant in the late war found it possible to act in accordance with the theories and aspirations which underlay the conclusion of the Postal Chapter of Convention No. XI of 1907. Were their practices consistent with the letter of that Convention ? If not, can the Convention be maintained in force ?

A most interesting section of the chapter dealing with the general principles of neutrality is devoted to Neutrality and the League. To what extent will states adopt an attitude of neutrality in future wars ? It certainly was the hope of the framers of the Covenant that war would in future be regarded as a crime

against humanity, and that a state violating the peace of the world would find ranged against itself, not only the state which it attacks, but a coalition of all the remaining countries. If that hope were realized there would be no more neutrality, but Dr. McNair shows that the possibilities of war in the future without any violation of the covenants of the League are sufficient to render it likely that there will be states entitled to adopt the rôle and claim the rights of neutrals.

One passage which Dr. McNair has introduced into the section dealing with compulsive means of settlement as between Members of the League seems open to criticism. In discussing one of the answers which the Committee of Jurists gave to the questions put to them by the Council of the League after the Corfu incident of 1923, Dr. McNair states that if the answer means that Article 12 of the Covenant is *not* violated by coercive measures involving the use of force against another Member of the League but not intended to involve a resort to war, the answer indicates a serious defect in the Covenant which should be amended. Surely this is an altogether erroneous view. Article 12 of the Covenant is only concerned with disputes which are likely to lead to a rupture. If the state which is obliged to take coercive measures desires—as it probably does above all things—to avoid recourse to war, it naturally does not itself regard the dispute as one which is likely to lead to a rupture. The amendment which Dr. McNair appears to contemplate would in the long run only encourage smaller states to ignore and to violate their duties towards other states. They would feel that, however much their shortcomings deserved retribution, the provisions of the Covenant would protect them. Except through the cumbrous machinery of Article 15, the League would have no power to coerce them into giving satisfaction, and yet would shield them from the consequences of their own misdoings. If such states, when subjected to coercion, regard the event as likely to lead to a rupture, it is for them to submit the matter to the Council, as the Covenant provides in the text as it stands to-day.

In general this first volume of the new edition of Oppenheim is an admirable piece of work, excellently printed on nice light paper and very free from misprints and typographical errors. A study of it for review purposes deepens the impression of what a valuable treatise Oppenheim wrote. How one may wish it could be sold at a more reasonable rate! Two guineas is a high price for a volume which should be widely read. C.

Selections from the second edition of the Abrégé du Projet de Paix Perpétuelle, by C. J. Castel de St. Pierre, Abbot of Tiron, 1738. Translated by H. Hale Bellot, M.A., with an introduction by Paul Collinet, Professor of Law in the University of Paris. (The Grotius Society Publications: Texts for Students of International Relations, No. 5.) Sweet & Maxwell & Co., Ltd. pp. 61. (2s. 6d. net.)

Dr. Bellot is to be thanked for having so faithfully performed what must have been a tedious task, for, whatever its importance as a stage in the advance of academic thought on a problem which becomes steadily less academic, the literary style of the *Abrégé* fully explains its having “found no readers.”

And yet, now that a translator has discarded all but nine out of “more than a hundred objections, some frivolous, some specious,” collected by the Abbé in

the course of more than twenty years, keeping only extracts from the abridged text, and from sundry "supplements" and "discourses," with their "reflections and explanations," their "observations" and "remarks," their particular and general "conclusions"; and now that the study of political organization on the international plane has in effect passed from the library to the laboratory, from the salon to the committee-room, there is plenty of seasonable teaching to be found in these fruits of a thinking lifetime, passed in an age when the society even of individuals was commonly ascribed to an original contract.

The challenge of the "European republic"—Sully's idea—was in those days addressed, not so much to the kind of bred-in-the-bone theory of multiple, mutually exclusive sovereignties so well known to us, as to the designs that one or another ambitious and warlike prince might cherish of progressively unifying Europe beneath his own individual sway. To demonstrate, by cold logic, why such a policy must, in a jealous world, prove both vain and suicidal, then no doubt seemed at least half the battle. To balance, on paper, the blessings to be gained against the trivial and "for the more part chimerical" claims to be sacrificed may well have seemed at least the other half.

Appeal to the fickle fortune of war is put as a terrible evil to be fled rather than as a privilege to be forgone—and no discomfort is noticed as apt to be involved in any incidental renunciation of sovereignty. Indeed the author is frankly unable to conceive how responsible ministers can fail in due course to discover, to appraise and in consequence to press for execution his plan for a lasting peace. And he adjures them in the name of their eternal salvation to embrace its benefits.

For not merely are the several monarchs—Europe is seen simply as a group of monarchies—to be afforded peace of mind by the sure promise of inexpensive and satisfying justice in any future difference amongst themselves; but, as touching that other source of monarchical insecurity, differences between themselves and their subjects, there is held out to them the snug belief that, rule they more wisely or less wisely, insurrection, like irredentism, will under the new dispensation be universally felt to lie beyond the bounds of practical politics. And this from the pen of one who has, on other grounds, been called the "patriarch and forerunner" of the "philosophes" who sowed the French Revolution!

Professor Collinet in his compact introduction shows impatience with Leibnitz, Voltaire and such others as join in voting the Abbé's proposals impracticable. He alludes to the statesmen of 1919 as merely "unconscious imitators." The Abbé's fault, he says, "was to be too much in advance of his time."

But was this not fault enough? Ought not to-day's prescription to proceed upon a diagnosis of to-day? And can mere eloquence in the denunciation of an evil atone for amateurishness in the analysis of its causes? Had the Abbé gone to Utrecht in youth rather than in middle age; had he followed, like Grotius, the narrow road—and in the limiting accoutrements—of a practical diplomat; not only might his thinking have profited more immediately the age in which he thought, but his writings might have gained in the persuasiveness of intellectual humility. In fact the Abbé is not so much an architect as a pioneer: and a pioneer of course must have freedom, and he must have faith: and faith lives longest at a distance from the earth.

Nor did the statesmen of 1919 set up to be especially original. Statesmanship has at times consisted, not in evolving an idea particularly new, but in applying

in a new situation the happiest selection of those ideas already in the air. And the Abbé's distinctive contribution is precisely that of having loaded the air with new ideas, not all of them now so clearly utopian as they may once have seemed.

Moreover, is it even loosely true to say that the Abbé's system is "more or less completely the basis of the League Covenant," and that the one great point of difference lies in the League's ideal of universality? His consecration of the territorial *status quo* does of course recur in President Wilson's XIVth Point and in Article 10; but what does the Covenant do with his wholesale outlawry of war, his compulsion to arbitrate and to comply with the resulting award, his international guarantee of reigning dynasties and national constitutions, his denial of a member's liberty to secede? Was it not precisely by its too thoroughgoing acceptance of his mechanical test of aggression, its too complete reliance on collective loyalty to a collective guarantee, that the Protocol antagonized many professing supporters of the Covenant? And if in recent days we have made more ado about conciliation and mediation, we do not apply those terms to the ballots, or bargains, of a body whether of two or of nineteen "Plenipotentiaries—who have their instructions."

And conversely, where, one may ask, does Professor Collinet find, as he implies, the Abbé expressly putting the case for open diplomacy? At what point does he mention disarmament as more than a mere consequential boon?—wherein of course he may be right.

The Professor is one of those who find comfort in analogies drawn from "the historical evolution of law as a procedure for appeasing conflicts by the substitution of justice" for force. But is the matter in truth so simple as that? In the hard case—which is here the only relevant case—does the law in fact appease the conflict, or does it not merely force it into quiescence? What gives peace of mind to the defeated litigant? Is it satisfaction on the point of justice, or is it the philosophic attitude which his sense of humour compels towards an order of things without which his life would be "nasty, poor, brutish and short"?

Not every conflict of interests presents a clear issue of right or wrong. Nor can the powerful sovereign state, wherever it may agree to stand in law, in fact assume towards society quite the relation of the natural individual.

The republication of the *Projet*, however, besides doing fit honour to the author, is fully justified for its value to the student, its help to him in distinguishing what is perennial and what new in contemporary proposals, forms and institutions, its reminder perhaps that mere humanitarian ardour, mere logic, and mere freedom from blind belief in the active statesman are not in themselves a complete bag of tools.

He will dissect the scheme as much for what it ignores as for what it contains, and weigh it against the conceptions most current at the time it appeared. Artificial organization for peace, if internationally attempted, would not then have involved quite the identical set of difficulties we are facing to-day.

In any event the Abbé deserves homage for having steadfastly contended that something in that sense might have and therefore ought to have been done. He of course lacked the instructive if sobering data afforded by modern experiments: he wrote in a time when theorists were particularly prone to reason as though human conduct were a matter of lines and squares and triangles. But his essay is full of ingenuity and makes points that are ever too easily overlooked. And the very pains and persistency with which he so unfruitfully toiled may

serve to suggest that perhaps after all no set of fundamental articles can be expected to establish peace for ever, no comprehensive contrivance be perfectly fool-proof and knave-proof—and proof against that *inertie courtoise* which, when the *casus foederis* requires a policeman, may tempt a third state to turn the other eye. It may tend in fact to confirm the stubborn suspicion that if mankind is ever to procure lasting freedom from recurrent war, eternal vigilance will be included in the price.

C. A. W. M.

Jeremy Bentham's Plan for a Universal and Perpetual Peace, with an introduction by C. John Colombos, LL.D. (The Grotius Society Publications: Texts for Students of International Relations, No. 6.) Sweet & Maxwell & Co., Ltd. pp. 44. (2s. 6d. net.)

When in 1925 the Draft Protocol of Geneva gave place to negotiations in view of a Rhineland Pact, much was said and written about the Englishman's native distrust of panaceas and broad abstract principles, and his leaning towards the separate treatment of particular points of danger in the light of a study of their special features.

How Jeremy Bentham would have greeted the Protocol can only be surmised, but it is interesting, in reading what, in this series of peace-plans, happens to be the only example from an English pen, to find how much more alien in spirit it is to the Protocol than to the Pact. The first pages do, it is true, refer broadly to "the world," the globe," "universal and lasting peace" and "the welfare of all civilized nations"; but this is mere matter of inducement and soon makes way for a reasoned assertion of Britain's peculiar interest in peace, and of the steps by which the British people are most effectually to serve that interest. The British people—for the message is directed to the general public, and looks to something like a democratic control of foreign policy.

Bentham's main plank is that England and France should sink such trifling differences as can be thought to hold them apart.

"Supposing Great Britain and France thoroughly agreed, the principal difficulties would be removed to "the establishment of a plan of general and permanent peace all over Europe."

Like Locarno—a first step.

The author recognizes only two sources of serious danger: distant dependencies, and secret diplomacy. These, however, England is to have no hesitation in discarding as both equally useless.

He also deprecates "treaties of alliance, offensive or defensive, with any power whatsoever." (Contrast the 'continental thesis' of the Abbé St. Pierre, with his closely knit system of guarantees, his outlawry of war, and his logical demonstrations of its fundamental foolishness.)

Unluckily for most of Bentham's specific suggestions their wisdom is made to appear dependent on the validity of certain reflections, which in their turn are based on some such unargued assumptions as these: 'No nation has any points to gain to the prejudice of any other'; 'but for the existence of colonies a navy would have no use except in the suppression of piracy'; 'any treaty which discusses war as a possibility *ipso facto* does more to increase than to lessen its likelihood'; and—hardest perhaps of all—"the rate of return to capital is fixed and uniform whatever its field of investment." As Dr. Colombos rightly observes,

Bentham's principal contribution was in the field of jurisprudence, where he showed "vision and clear reasoning and practical common sense." It is when the jurist for a moment turns his mind to the science of international relations—dictating, say, the right policy for an international legislator, or seeking to enumerate exhaustively the possible causes of war—that his output becomes more conspicuously academic.

Amongst the causes of war he notices ambition, and passion, and difference of opinion; but says nothing of raw conflict between interests claimed to be legitimate. (Nor for that matter does the Covenant—in express terms; but it does none the less assume a possibility of questions not easy to solve, and solutions not easy to accept.)

Armaments the author would limit—merely, however, as a source of patently useless expenditure; and after one or two curiously modern remarks he lightly passes from the topic. Others rather shrewdly touched on include: the constitutionality of secret diplomacy (with the difference properly noted between the negotiation of treaties and their definite conclusion); the possibility, when peace and war are in the balance, of a strife between the interests of the "ring-leader" and those of "the rest of the gang"; and the beguiling and confusing power of the association of ideas.

But perhaps his best suggestion is the common tribunal by which, on the occasion of a difference of opinion between negotiators, minor concessions can be secured on one side or the other without involving loss of face for the party affected. In expounding Proposition XIII he speaks variously of a "common court of judicature," a "common tribunal," "arbiters," "the European fraternity," "the Congress or Diet," "the Court": and Dr. Colombos is thus not greatly to be blamed for asserting that "besides a Common Judicature, Bentham was also in favour of a Common Legislature between states." Yet, on a careful reading of the passage as a whole, it seems difficult to doubt that all these separate expressions are intended to refer to one and the same organism, in nature neither a judicature nor a legislature, but reminiscent rather of the Abbé St. Pierre's Senate of Peace, or possibly the League of Nations proceeding under Article 15.

What Bentham here says about Manifestoes suggests a perhaps not wholly idle speculation as to what measure of publicity a report by the Council or Assembly would secure at the hands of a state unfavourably dealt with therein. Would it, of any country, be true nowadays to say, as Bentham does in a slightly different context, "on these subjects the language of all newspapers is uniform"?

C. A. W. M.

Les Effets des Transformations des États sur leurs Dettes publiques et autres Obligations financières. Tome I. *Dettes publiques.* Par A. N. Sack, Ancien Professeur agrégé à la Faculté de Droit de l'Université de Pétersbourg. Préface de N. Politis. Bibliothèque des Œuvres Juridiques Étrangères. Recueil Sirey. Paris, 1927. pp. 608 + xvi. (frs. 80.)

The work of Professor Sack deals with a question of international relationships to which the events of the last few years have given very high practical importance. The relations of states to their creditors, whether private individuals or other states, raise just one of those questions which are characteristic of the closer international society which is a product of modern economic integration.

Professor Sack's present volume (which is to be followed by another dealing with financial obligations other than public debts) is concerned with the effect produced on public debts by the transformation of the debtor state, whether by revolution or other internal change ("political transformation") or by loss of territory or by disappearance, resulting either from annexation or subdivision ("territorial transformation"). The subject, with which legal literature has not hitherto dealt in a measure adequate to its importance, is handled by the author in the most thorough and exhaustive fashion; it is no exaggeration in this case to use the somewhat conventional phrase and to say that the work is henceforth indispensable to every serious student of the subject. Professor Sack seems to have left unnoticed no authority or source of authority, and no incident of modern history bearing on the subject; in particular the question of the division of the debts of the Austro-Hungarian Monarchy under the auspices of the Reparation Commission has been considered in the light of information supplied from (amongst other sources) the Commission itself. At the same time the practical value of the volume would be greatly increased if it were supplied with a thorough index both of subjects and proper names. The author tells us that this lacuna will be supplied when his second volume appears, and it is to be hoped that the index will be worthy of the work.

When we pass from the invaluable collection of facts and precedents which the author lays before his readers to the general views which he holds as to the nature of public debts and the legal rights and duties which result from the transformation of a debtor state, there is naturally room for difference of opinion. One may feel, for example, some hesitation in accepting the opinion of the author that public debts "*grèvent le territoire*" of the debtor state (p. 44), if by that is meant that they are a "charge" in the English sense of the word on territory, or again that state debts are "*garanties par tout le patrimoine de l'État*" (p. 41), if that expression is to be read as implying anything in the nature of a "charge." The reviewer would prefer to regard state debts as personal obligations of the state *qua persona* of international law, except in so far as a specific security is given on specific revenues or (if that in modern times is conceivable) specific territories. If we attempt to go further and say that something beyond the state *qua persona* is affected, it would seem more logical to find that the liability attaches to the population of the territory—but no one ever has suggested that emigrants carry with them an obligation for the discharge of the national debt of the country which they leave behind. The reviewer in fact is not convinced that so long as the personality of the debtor state remains unchanged there is at the present time any rule of positive international law which requires the apportionment of the public debt upon a loss of territory. That such an apportionment ought as a matter of justice both to debtor and creditor to take place may be readily admitted, but to say that there exists anything more than a general practice to make such an apportionment by the treaty of cession is to go beyond what is warranted by the facts. In the absence of a treaty provision the debtor state which cedes territory remains bound to its creditors as before and the creditors have no right of recourse against the annexing state. Here the reviewer finds himself in disagreement with the learned author who tells us (p. 235) that in such an event treaties which "irregularly" (*d'une façon irrégulière*) diminish the burden of debt affecting one territory to the disadvantage of another, or give to particular territories or to creditors irregular or improper

advantages or disadvantages, are not binding on the creditors and regulate only the relation of the states concerned as between themselves. The reviewer does not believe that positive international law has at present gone so far to anticipate the advent of the Kingdom of Heaven.

This last passage has attracted the notice of M. Politis in the valuable and interesting preface which he contributes to the volume, and prompts him to the remark that the right of a private creditor against a state is superior to state law (*supra-étatique*) and therefore a proper subject of international law. The reviewer confesses that for the present he prefers to remain, in M. Politis's words, "a prisoner of the tradition which sees in international law only the rights of states." After all, the Permanent Court of International Justice is in the same prison. But this is not to say that the rights of private creditors against states are not a fit subject for legal rule.

Enough perhaps has been said to show that M. Sack's work is not only profound and industrious in its presentation of the facts, but also stimulating in its theories.

J. F. W.

Das Völkerrecht in seinen Grundzügen dargestellt. Von E. von Waldkirch. Basel, 1926. pp. xvi + 420. (Swiss frs. 16.)

This short book, which surveys the whole field of International Law, has a limited purpose which makes it a useful popular exposition of the subject. Dr. von Waldkirch, who is a *Privatdozent* in the University of Berne, believes that the experiences of the war and post-war periods have made it more than ever necessary to fix attention on the fundamental principles of inter-state order, and he has attempted, therefore, to present the main outlines of International Law as distinctly as possible, relegating the details of its application to a place of secondary importance. Hence he has devoted a full quarter of the book (Part I) to the theory and history of the subject. He rightly points out that what differentiates International from other kinds of law is its backward state of development; being pre-eminently a system of customary law, it has not yet developed either standing courts for its interpretation or compulsory executive organs for its application. But these defects are inherent in customary law; to infer from them that the nature of the system is other than juridical is to ignore the history of law generally, to disregard many sides of existing law, for example, constitutional law, and also to base oneself on a theory of the state which is not only untenable but is easily shown to be false by observation of the practice of states themselves. Part II deals with the international legal society in general; Part III with peaceful relations; and Part IV with disputes. Fifty-three pages, about one-eighth of the book, are given to war, which, in the author's view, though more than a mere relationship of fact between states, because there are legal principles which affect its conduct, ought not to be regarded as a form of legal process. He notes recent attempts to restore the historical distinction between lawful and unlawful wars, but is doubtful whether they are practicable. Inevitably in a book of this compass difficult and interesting problems receive treatment which is apt to appear summary or dogmatic; but Dr. von Waldkirch's book is often suggestive, and he has made a wise apportionment of his limited space.

J. L. B.

A Treatise on the Law of Prize. By C. John Colombos, LL.D. Sweet & Maxwell, Limited, London. xxx + 384 pp. (15s.)

This is one of the Grotius Society publications. The general scheme of the book is to state under each of the headings into which the law of prize can be divided the position of the law as understood in Great Britain and the United States in 1914, and then to give an account of the more important judgments dealing with the subject which were given during the War by the Prize Courts of the British Empire, followed by a similar account of the decisions of the Prize Courts of the other belligerents. The work is carefully and accurately done, and Dr. Colombos has produced a book which should be of considerable use to the practitioner, especially as it contains a certain amount of material (e.g. the decisions of the Russian Prize Courts) which is not easily accessible elsewhere.

Although the book is to be regarded primarily as a compendium of reported decisions, it contains a certain amount of discussion of the various subjects dealt with. Dr. Colombos does not hesitate to criticize decisions which he thinks wrong, and his criticisms show a refreshing independence of thought, even though they are not always very profound; it may be suggested, for instance, that the statement on page 116 that it is impossible to reconcile the decision in the *Pellworm* with that in the *Valeria* does less than justice to Lord Sumner's judgment in the former case, and to the distinction which he was careful to draw between the restitution of the *res* where there is one to restore and the payment of damages where there is not. It is difficult to compress into a work of this kind a sufficient theoretical discussion of the various subjects, and Dr. Colombos's treatment in Chapter 8 of the legitimacy of the "blockade" of Germany is inadequate; the same may be said of the discussion of angary in Chapter 9. On the other hand the discussion in Chapter 10 of Prize Court procedure as developed during the War is full and good.

We have noticed a certain number of faults, due sometimes to careless writing, which might be corrected if, as may be hoped, a second edition of the book is called for. On pages 57-9 the law as to the possibility of a foreigner's acquiring a domicile in a country where his estate enjoys the privilege of capitulations is stated as laid down in the *Indian Chief*, and during the War in the *Eumaeus* and the *Derfflinger*, without any reference to the decision of the House of Lords in *Casdagli v. Casdagli*, which, though too late to affect the decisions on the point during the War, would certainly be material if the question came before a Prize Court in future. A passage on page 184 seems to suggest that in cases of contraband the Courts will condemn without any evidence at all having been submitted by the captors if the claimant fails to satisfy the Court of the innocence of the transaction. This was certainly not the practice of British Prize Courts during the War, and the cases quoted do not amount to any authority for such a proposition. On page 226 blockade is defined as "the interception by sea of the coasts or ports of an enemy for the purposes of cutting off all communications." This may or may not be an accurate definition of blockade as it exists to-day, but it is certainly somewhat peculiar English. On page 297 the constitution of the Naval Prize Tribunal is inaccurately stated. On page 333 the paragraph dealing with the question whether American Prize Courts are bound by enactments passed by the competent constitutional authority is inadequate; there are decisions of the Supreme Court which leave the reader in a considerable state of

uncertainty as to what the view of the Court on the point was, but they ought at any rate to be mentioned in any discussion of the subject.

There is a final chapter on "An International Prize Court" which gives a good account of the existing position, but underrates the difficulties in the way of the establishment of such a tribunal. Professor Pearce Higgins contributes a valuable introductory chapter in which he gives a general account of the decisions given during the War on the law of prize.

W.

Éléments du Droit international public universel, européen et américain. Par Karl Strupp . . . en collaboration pour l'édition française avec Joseph Blociszewski. Paris, Rousseau. 1927. xvi + 432 pp. 66 francs.

This is in essence a French translation of Dr. Strupp's *Theorie und Praxis des Völkerrechts*, published in 1925, and it will be welcome to English readers and others who find the German technical terms of international law somewhat difficult.

Dr. Strupp gives in a very few words his object in writing this book: "I consider," he says, "that, contrary to received opinion, only a small portion of public international law possesses a universal character: the greater part of rules of such law are domestic or regional. From this point of view, the nations of the world form various groups—European-continental, American-continental, Anglo-American, Latin, Scandinavian, and so on. These rules often differ considerably between one group and another, whence spring misunderstandings and conflicts." His object is underlined in a preface contributed by the eminent South African jurist, Dr. Alejandro Alvarez. "Il rompt franchement," says Dr. Alvarez, "avec la conception traditionnelle de l'universalité de toutes les règles juridiques. Il adopte la méthode réaliste d'après laquelle dans ces règles il y a une véritable échelle, une sorte de gradation: les unes ont un caractère continental, d'autres sont particulières à certaines écoles ou à des groupes de pays, d'autres, enfin, ont une portée encore plus limitée. . . . Il n'expose que le droit positif actuel et, contrairement à la généralité des publicistes, ne dit rien du droit naturel ou idéal qui, à son avis, ne sert qu'à créer des malentendus touchant le droit en vigueur. D'après notre auteur, le droit naturel n'est utile que pour orienter le législateur."

Dr. Strupp accordingly uses a good deal of material from (North and South) American sources, and some of this will be found useful, though as a work of reference it is probable that Fenwick will still be more widely employed. His treatment of some of the topics which most nearly interest us is, to tell the truth, somewhat jejune, as may be seen from the following section, on "Le droit de blocus pendant la guerre mondiale":

(a) "Au début, les États ont accepté expressément ou implicitement les règles de Londres.

(b) "Mais elles ont été bientôt modifiées ou abrogées:

(1) "Par l'élargissement de la présomption de connaissance du blocus;

(2) "Par le rétablissement de la théorie du voyage continu: notamment par la Grande-Bretagne, l'Italie, les États-Unis. Cette dernière Puissance déclara comme suffisante l'intention de faire voile pour le port bloqué (droit de prévention) et réaffirma le droit de suite."

We can speak highly of Dr. Strupp's documentation ; most of his sections include really valuable bibliographical clues, and where he hardly gives what is wanted he at least shows where it can be got.

STEPHEN GASELEE.

The Law and Procedure of International Tribunals. By Jackson H. Ralston. Revised Edition. Published by the Stanford University Press, California. xi + 512 pp. (£1.)

This is a new and enlarged edition of Mr. Ralston's *International Arbitral Law and Procedure* which was published in 1910. The new work is somewhat wider in scope and contains a great deal more material.

It is a valuable work. It endeavours to present in a handy and summarized form the decisions which have been given by the various arbitration tribunals and claims commissions whose reports have been published on the various points which have come up for decision. Successive chapters of the work deal with the various points which have been decided as to treaties and their interpretation, as to the powers and jurisdiction of claims commissions, the qualifications of individual claimants, the procedure before the claims commissions, the evidence required in support of claims, the measure of damages where claims are held to be well-founded. There are also chapters on the rights and privileges of aliens, the responsibility of governments, the attributes and limitations of sovereignty, and on the extent to which the rules of prescription apply to claims between governments.

The above description of the contents of the work shows that it embodies a mass of case law on points which come up for decision in international litigation.

Any student of international law must have been struck with the small importance which text-book writers, such as Oppenheim (*International Law*, 3rd ed., vol. i, p. 23), give to the decisions of international tribunals as sources of international law. The position was more accurately described by Monsieur Renault in the report on Convention XII for the establishment of an International Prize Court at the Hague in 1907. When speaking of the law to be applied in the new court, and after referring to the uncertainty of the rules on some points connected with maritime law in the absence of any treaty provisions, M. Renault went on to say : " The situation will to a great extent resemble the condition which has for a long time existed in courts of countries where the laws, chiefly customary, were still rudimentary. They made the law at the same time as they applied it, their decisions formed precedents which became an important source of law." That is the true function of case law in connexion with the gradual formation and development of international law, and it is as a source of information as to the cases which have been decided that Mr. Ralston's book forms a valuable contribution to the literature of international law.

C.

Die Verfassung der Völkerrechtsgemeinschaft. Von Dr. Alfred Verdross, Professor an der Universität Wien. Vienna and Berlin : Julius Springer. 1926. 228 + vi pp.

Professor Verdross tells us in his preface that his book treats of the " Constitution " (*Verfassung*) of the community of international law in the sense of the rules which deal with the construction, the organization, and the scope of the

activities of that community. This constitution is to be found in the general rules of international law, whose existence is conclusive evidence that international law is not a mere collection of isolated fragments without any inner cohesion; but a harmonious Order of Principles (*Normen*) which are rooted and established on a foundation of unity. Professor Verdross defends what he calls the "monistic" interpretation of law against the prevalent dualistic conception, with its sharp division between international and municipal law.

The work, as might be expected from such a preface, deals rather with the philosophy of international law and indeed of law in general than with its actual application in mundane affairs. The author goes back—or forward—to a revival of what he terms the "classical" doctrines of international law in contrast to the prevalent theories of the positive school. He finds the basic principle—the *Grundnorm* or *Grundsatz*—of international law in the maxim *Pacta sunt servanda*. Is this, however, so clear, so universal, so self-evident as to form the *ποῦ στῶ* not merely of current practice but of a legal philosophy? An English student will be inclined *prima facie* to object that as a matter of history—if that is relevant—*assumpsit* was a late-comer among our forms of action, that there are grave differences between the laws of different countries as to the enforceability of contracts, the doctrine of consideration, for example, being peculiar to the Common Law, and, most important of all, that the rule that agreements must be kept needs control or modification by those higher rules of public policy devised in the general interest, which all civilized societies in all ages have imposed to a greater or less extent on the contractual capacity of individuals. Equally, international society may develop—if we speak only as speculative philosophers—something in the nature of a doctrine of the higher interests by which international contracts will be tested. The sacredness of treaties is the best of good working maxims, but it is not a "know thyself" revealed from heaven.

A specially interesting passage in the book is that in which the author discusses the vexed question of "gaps" (*Lücken*) in international law. He holds—and the present reviewer is inclined, as at present advised, to agree with him—that as a matter of legal theory no such gaps exist. But for English readers the argument would have been more persuasive had it condescended rather more upon particulars, and given concrete examples of the cases where positive law most obviously needs development and exists, if at all, in the best intelligences of the Permanent Court.

The book is one of considerable philosophical and scientific interest and its attractiveness, at any rate for non-Germans, is increased by the fact that it is excellently printed in Latin characters.

J. F. W.

Grundzüge des positiven Völkerrechts. Von Dr. Karl Strupp. 3. völlig neubearbeitete Auflage. Bonn: Röhrscheid. 1926. 280 + xv pp.

This, as its title shows, is a third and revised edition of Dr. Strupp's *Outlines of Positive International Law*. The book originated in lectures given in 1920 at Frankfurt University, where Dr. Strupp is a "Privat-dozent"; the second edition appeared in 1922, and is published as part of a "Citizen" (*Staatsbürger*) series of publications, intended to serve as an introduction to the study of public law. It is designed as a text-book of the positive, contemporary international law actually in force, and thus forms a complete contrast to the work of Dr. Verdross.

The book is clearly written and, so far as we have been able to test it, comprehensive ; its account of international legal relations is brought down to the date of publication (June, 1926). Its value is increased by an excellent index. An English student (the work is being translated into Italian and Bulgarian, but apparently not into English) could not, however, be advised to accept it by itself as a completely accurate summary in all respects of the international law of the present day. Thus, Dr. Strupp holds (p. 175) that the constitution of the British Dominions "depends upon the will of the foreigner" (auf fremdem Willen beruht) ; he defines war as a relation of "independent states" and so tells his readers that in the American Civil War (which he calls the War of *Succession*) the Southern States were "recognized" by Great Britain (p. 192) without adding that the recognition went to belligerency only and not to independence ; in his discussion of the failure of the Hague Convention of 1907 to become generally binding in the World War owing to non-ratification by some belligerents, he does not call attention to the judgment of the Judicial Committee of the Privy Council in the case of *The Blonde*.

In his account of the Treaty of Versailles (p. 266) he fails to distinguish between the gross amounts of coal which the Reparation Commission had an option to call for from Germany, had German economic conditions permitted, and the actual German obligation ; in his summary of the Dawes Plan (p. 268) he gives only the amount of the German contribution *from the budget* and omits the payments from the railway bonds and the industrial debentures. As might be expected, in his statement of the construction of Article 23 (h) of the Hague Rules for the Laws and Customs of War on Land 1907 (right of "nationals of the adverse party" to sue in a court of law) Dr. Strupp takes the German view as to the scope of the clause, but fair notice is given of the views of English and American authorities.

Dr. Strupp recognizes the Locarno Treaties (page 186) and the Washington Naval Agreement (p. 182) as landmarks on the road to a more peaceful world, but his suggested definition of "attack" (*Angriff*) for the purposes of the Locarno treaties as "the forcible and deliberate invasion (*Eingriff*) by one state of the body (*territorium*) or soul (political independence) of another" raises by its psychological terminology more difficulties than it solves.

The book is printed in Gothic script and its conciseness is increased by the free use of abbreviations, of which a table is given, but which are at first puzzling to an English reader—thus V.V. (Treaty of Versailles, *Versailler Vertrag*) is in Gothic capitals perplexingly similar to V.B. (League of Nations, *Völkerbund*).

J. F. W.

L'Exterritorialité. By Baron Alphonso de Heyking. Paris : Rousseau et C^{ie}. vii + 219 pp.

This is a second edition of the book which the author, who was formerly Russian Consul-General in London, published in 1889. It comprises the text in somewhat amplified form of the lectures which the author delivered at The Hague in 1925 for the Academy of International Law, and which are printed in the *Recueil des Cours* of the Academy, 1925, vol. ii, p. 237.

The greater part of the book is devoted to the immunities which diplomatic representatives enjoy by virtue of the principle of extrterritoriality in the country

to which they are accredited. The author lays stress on the true nature of the principle of extritoriality as the foundation of diplomatic immunities, that is to say, non-subjection to the local law, and joins with the majority of writers on international law in discarding the fiction that diplomatic agents are to be regarded as outside the territory of the state to which they are sent and as remaining in the territory of the state which they represent.

Exterritoriality is treated by the author under all its aspects. He treats in detail of the occasions on which the principle operates, and discusses not merely the immunities of diplomatic representatives but those which the members of the Secretariat of the League of Nations enjoy under Article 7 of the Covenant, and also those accorded to members of arbitration tribunals and to the personnel of international commissions, such as the European Commission of the Danube. Chapters are devoted to the immunities enjoyed by sovereigns, by the Pope, and by consuls in the Far East, and a section of the volume is devoted to the régime of the capitulations in countries like China, Persia, and Morocco. A few pages are also devoted to the privileges enjoyed by warships in foreign countries, and by the military forces of another state when stationed in foreign territory.

The subject is really too large to be dealt with in a volume of two hundred pages, and the treatment accorded to some parts of it seems inadequate. Only three pages, for instance, are allotted to the position of military forces in occupation of enemy territory, and the Regulations annexed to the Land War Convention of 1907 are not even mentioned.

Some of the statements which the author makes will not meet with universal acceptance and should have been supported by authority. For instance he lays down the rule (p. 122) that presidents of republics have no right to the immunities which are accorded to the monarchical heads of states, and the view set out on p. 184, that vessels, the property of a foreign government, are entitled to no immunities unless they are men of war or privateers, is in flagrant contradiction with the case of the *Parlement Belge* (L.R. 5 P.D. 197) and with all modern international practice.

There are also unfortunately a good many minor inaccuracies to be found in the book, such as the statement that Egypt has been a British Protectorate since 1882.

C.

Foote's Private International Law. Fifth edition, by Hugh H. L. Bellot, M.A., D.C.L. Sweet & Maxwell. 1925. xxviii + 292 pp.

Dr. Bellot has made considerable changes in this edition of 'Foote.' The introduction is omitted altogether—part of it was obsolete and the remainder, consisting of a synopsis, was of value only to students. The same reason has led the editor to omit from the new edition the summary which formerly appeared at the end of the book. These changes are all to the good, for it is as a practitioner's book that his work must be judged; it is not a student's book. In spite of these omissions the editor laments that the mass of new material makes the new edition still larger than the last.

It is perhaps a most common, but nevertheless a most serious, demerit in English legal text-books of reputation that in the course of time in the hands of successive editors they grow longer and longer by the addition of recent cases, while the older matter is allowed—perhaps out of respect for their distinguished authors or because of what their editors deem to be the limits of their task—to

remain as a source of confusion to the reader when it has become out of date and even inaccurate. In fact one might say that such works sometimes resemble Justinian's *Corpus Juris*, in that in order to explain apparent contradictions one has to assign the different passages to different periods and to different hands.

This work now suffers somewhat seriously from this fault. To take an example at random : in the beginning of the chapter on domicile (p. 77) one finds a statement, based upon the authority of Lord Westbury in *Udny v. Udny*, that whereas nationality depends upon different laws in different countries "civil status is governed universally by the single principle of domicile, the criterion established by international law for determining it". The statement certainly suggests that there are in the world no systems of law in which the criterion adopted for determining civil status is nationality, and the impression is rather confirmed by the fact that the problems of the *renvoi* do not appear to be even mentioned in any part of the book. Is not this a case of the work of an earlier hand still remaining though now out of date ?

In different parts of this same chapter one finds the following statements as to the capacity of a married minor to acquire a domicile of his own : "It is doubtful whether a married minor's setting up a separate establishment puts him in the position of one *sui juris* ; for in the first place the assertion in the affirmative involves a confusion between domicile and residence, and consequently it is not supported by English law which does not alter an infant's contractual liability in the event of his marriage" (p. 79). "If a youth is old enough to marry and acquire a home of his own, he is old enough to change his domicile and a conventional law can no more limit his capacity in one case than in the other" (p. 93). These statements at least appear to be somewhat contradictory. Is it permissible to speculate that one is by an earlier and the other by a later hand ?

Dr. Bellot deals fully with the new British Nationality statutes, taking the sections of the British Nationality and Status of Aliens Act of 1914 one by one and appending a commentary to each. This is a convenient system, but in one or two instances the cases cited would appear more properly in the commentary on other sections than in the place where they actually occur. For instance the cases of *Ex parte Freiburger* ; *Vecht v. Taylor* ; *Dawson v. Muli* ; *Gschwind v. Huntingdon* ; all appear under section 13 of the British Nationality and Status of Aliens Act of 1914, though *Freiburger's* case really belongs to section 14, and the other three would appear to be really examples of the principle contained in section 16. Further, in a work where the editor is pressed for space, it may be wondered whether it was necessary to repeat exactly the same paragraph twice over in the same chapter (on p. 27 and p. 55) and to fill up nine pages with the Home Office Naturalization Regulations.

Dr. Bellot has done a valuable work in collecting so much new material, and the book will, for this reason, be valuable to practitioners. He might, by way of reply to criticisms, point to the last statement in his preface, that "it is easier to write a new book than to edit an old one." It is to be hoped that in the next edition he will take a bold course and deal freely with his materials, even if the result is practically the writing of a new book. It should prove a more satisfactory as well as an easier task. *Foot's Private International Law* can hardly stand another edition in which the new cases are added like new bricks on an old wall. The time has come when the wall should be taken down and rebuilt.

E.

Beiträge zur Reform und Kodifikation des Völkerrechts. Kiel, 1926.

This is a new series of monographs published under the auspices of the *Institut für internationales Recht* in the University of Kiel. Three numbers of the series have now appeared. The first (*Allgemeines Völkerrecht des Küstenmeers*, von Theodor Niemeyer; pp. 40; R.M. 2.40) inquires how far there exists at present a customary international law of territorial waters with universal validity. Dr. Niemeyer's answer is a little startling, though it would be difficult to refute him. He thinks, firstly, that the three-mile limit is recognized, but only as a minimum distance; that is to say, no state either demands or concedes less than this, but on the other hand many states claim and exercise rights over a greater distance, either for all or for some purposes. Secondly, he thinks that innocent passage through territorial waters may not be forbidden by the littoral state. Beyond these two principles the law is uncertain; in particular the nature of the rights of the littoral state, whether sovereignty or something less, cannot be stated with assurance. An appendix collects a number of drafts of proposed codifications of the law of territorial waters.

In the second monograph (*Die de facto-Regierung im Völkerrecht*, von J. Spiropoulos; pp. xvi + 188; R.M. 7.50) the author protests against the fragmentary treatment generally accorded to this subject in the text-books, and thinks that political considerations have been allowed to distort international legal theory. For this reason he criticizes rather severely the practice, which, by the irony of history, seems to have become the policy of recent American administrations, of refusing recognition to *de facto* governments of revolutionary origin. He succeeds, too, in showing what curious situations may result from the Anglo-American doctrine, which regards an unrecognized *de facto* government as legally non-existent for the courts of non-recognizing third states. His own purpose is to contribute something towards filling up the gaps in the present law with a view to its ultimate codification. One may doubt, however, whether this subject is not rather pre-eminently one of those aspects of international relations in which the political will overshadow the legal side for an indefinite time to come. It is the facts that are apt to be refractory, and they will not be altered by a juridical change. But this consideration hardly affects the value of the service which Dr. Spiropoulos has performed in the collection and discussion of the important material here presented. An English reader would have welcomed a fuller index, particularly an index of cases cited.

The third monograph (*Der Völkerbund: Verfassung und Funktion*, von Th. Niemeyer, C. Rühlmann, und J. Spiropoulos; pp. viii and 194) sets out succinctly the essential character of the League as exhibited in its constitution and functions, and supplies a guide to the sources of fuller information. Five chapters deal with (1) the juristic nature of the League; in the authors' opinion neither the analogy of the state, nor that of a confederation, is helpful; they regard the League rather as a political foundation, whose destiny, juridically regarded, is not foreordained, but remains to be shaped by human forces; (2) the League's historical origins (divided into periods before and after December, 1918); (3) its constitution (including a short explanation of each section of the Secretariat and of the various Commissions); (4) its activities from 1920 to 1926 (classified under the headings of mediation, co-operation, and promotion of justice); and (5) the League's functions in execution of the treaties of peace, which, the authors

suggest, sometimes conflict with the high aims announced in the preamble of the Covenant. An appendix sets out documents which it is useful to have collected in a convenient form, including the various schemes out of which the final form of the Covenant emerged at Paris, and the regulations of the Assembly and Council.

The extract from the Institute's memorial, which is printed on the cover of these monographs, is a fine confession of faith in the vitality of international law and in the solidarity of nations; and anything written in the spirit there indicated cannot fail to contribute towards international understanding. It is notable that its date was 1916.

J. L. B.

Some Mexican Problems. By Moises Saenz and Herbert Priestley. University of Chicago Press and Cambridge University Press. ix + 175 pp. (10s.)

This little volume contains the text of six lectures given at Chicago in the summer of 1926 under the auspices of the Norman Wait Harris Foundation. Mr. Saenz is the sub-secretary of the Department of Education of Mexico and Professor Priestley presides over the Department of History in the University of California. The lectures are more concerned with international relations than with international law, but they are very interesting and readable and give a good insight into the conditions which have produced the tension now existing between the United States and Mexico. We would recommend particularly the first lecture in the book, on "Foreign investments and Mexican nationalism," and the last, on "The United States and Mexico." The former, written from the Mexican point of view, gives a vivid picture of how Mexico finds her economic and commercial life permeated by foreign exploitation and yearns for freedom from the foreign incubus. The latter, written from the American point of view, contends that, if the Latin republics suffer from excessive penetration of American capital, it "is due to the vacuum they have left in their economic systems through neglecting to occupy fully their own national sovereignty and to develop and use their own capital and their own men of enterprise in productive investment."

Mexico, like China, is teaching us that conditions may arise in which rights, whether founded on treaties or on general principles of law, cannot be enforced. The business of statesmanship is to remedy those conditions, and wise statesmanship removes them *before* they are found to be intolerable instead of waiting until the unpleasant discovery is made.

C.

Gaskrieg und Völkerrecht. Von Josef L. Kunz. Vienna: Julius Springer. (M. 4. 80.)

Gaskrieg und Völkerrecht is a careful and reasoned study on the use of gas during the war and the trend of public opinion on the subject since. The author outlines in logical sequence the history of gas warfare, its permissibility during the war and the problem how to prevent its use in the future. He goes into useful detail about the various kinds of gases and means of employing them, not forgetting the diabolical employment of sternutatory gases which obliged the troops to take off their masks only to receive a wave of a different and this time lethal gas. The English chemist, however, will be surprised to learn that

chlorine (with which the Germans started the ball rolling) is not a poisonous but an irritant gas. We should call it an irritant poison. The Germans first used asphyxiating gas at Ypres on April 22, 1915. The author justifies its use by the famous "si omnes" Clause which when Turkey entered into the war released the parties to the Hague Convention, which Turkey had not ratified. Having shown to his satisfaction that the Hague Conventions were not binding on the belligerents in the war, the author deduces, unwarrantably it would seem, that therefore gas warfare is not prohibited in international law and consequently that the phrase "gas warfare being prohibited" in the Treaty of Versailles is *ultra vires*. But surely these prohibitions were merely declaratory of the laws of war as old as civilization itself. Cf. Grotius: "*Jus gentium si non omnium certe meliorum jam olim est ne hostem veneno interficere liceat.*"

Dr. Kunz distinguishes throughout his essay between legal considerations on the one hand and ethico-political considerations on the other, forgetting, however, as it seems to me, that the law is engendered by moral considerations and that political expediency may sometimes be frankly non-moral. The justification of the use of gas during the war is based on the insistence on the letter (to the neglect of the spirit) of what the author conceives to be the law—a defect of legal systems that depend on codes rather than on a common law.

Perhaps the least satisfactory part of the monograph is the section devoted to the legal concept of war. The author compares the "Anglo-Saxon" notion that war takes place between individuals with the "continental" notion that it takes place between states, but he unfortunately gives no examples of what he means by this. You cannot put a bayonet into the state.

The author sketches in an interesting manner the history of public opinion on the subject and the practical difficulties, brought up at various recent conferences, in the way of the abolition of gas warfare. He examines and dismisses the possibility of restricting it and plumps for its total prohibition in terms of an international convention which he gives in draft form.

The horror excited throughout the civilized world by the first employment of gas was not, one would suggest, only because "every new weapon of war is at first considered barbarous," but because it was felt that unwritten international law was being violated. If international law depended solely on treaties, it would long have vanished from the scheme of things. From the moment, however, that it becomes clear that one or more nations intend to use this weapon, its prohibition tacit or otherwise by international law ceases to exist, for the greatest danger of all would be for a nation to be lulled into a sense of false security by adhesion to what might turn out after all to be only a scrap of paper.

TEMPLE GREY.

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- Eighth Session. Geneva, May 26 to June 5, 1926. Report by the British Government Delegates to the Minister of Labour. [*Cmd. 2749.*] 3d. (3½d.)
- Ninth Session. Geneva, June 7–24, 1926. Report by the British Government Delegates to the Minister of Labour. [*Cmd. 2750.*] 3d. (3½d.)
- Proposed action by the British Government regarding draft Convention and recommendations adopted by the Conference at its Seventh Session, May 19–June 10, 1925. [*Cmd. 2633.*] 1d. (1½d.)

- Iraq.** Treaty between United Kingdom and Iraq regarding the duration of the Treaty between the United Kingdom and Iraq of October 10, 1922. Signed at Baghdad, January 13, 1926. (Ratifications exchanged at London, March 30, 1926.) (*Treaty Series No. 10*, 1926.) [*Cmd. 2662.*] 1d. (1½d.)
- Treaty with King Feisal, signed at Baghdad, January 13, 1926, with Explanatory Note. [*Cmd. 2587.*] 2d. (2½d.)
- See also Mosul.
- Italy.** Agreement between the United Kingdom and Italy to regulate the professional practice of medical practitioners in their respective territories. Rome, May 21, 1925. (*Treaty Series No. 50*, 1925.) [*Cmd. 2551.*] 2d. (2½d.)
- Italian War Debt. Agreement for the settlement of the War Debt of Italy to Great Britain. [*Cmd. 2580.*] 1d. (1½d.)
- Reciprocal recognition of Proof Marks. Notes exchanged between the United Kingdom and Italy. London, June 24, 1926. (*Treaty Series No. 21*, 1926.) [*Cmd. 2728.*] 1d. (1½d.)
- See also Locarno, Memel, Somaliland, Tsana Lake.
- Kamaran Island.** See Netherlands.
- League of Nations.** Committee on the composition of the Council. Report to the Council adopted by the Committee. Geneva, May 17, 1926. (*Miscellaneous No. 6*, 1926.) [*Cmd. 2665.*] 1d. (1½d.)
- Sixth Assembly. Report of the British Delegates to the Secretary of State for Foreign Affairs. London, November 26, 1925. (*Miscellaneous No. 1*, 1926.) [*Cmd. 2576.*] 9d. (10d.)
- Seventh Assembly. Report of the British Delegates to the Secretary of State for Foreign Affairs. (*Miscellaneous No. 12*, 1926.) [*Cmd. 2780.*] 1s. (1s. 1d.)
- Thirty-Sixth Session of the Council. Report by the Rt. Hon. Austen Chamberlain, M.P. (*Miscellaneous No. 14*, 1925.) [*Cmd. 2543.*] 3d. (3½d.)
- Thirty-Seventh Session of the Council. Report by the Rt. Hon. Sir Austen Chamberlain, M.P. (*Miscellaneous No. 2*, 1926.) [*Cmd. 2594.*] 6d. (6½d.)
- Thirty-Ninth Session of the Council. Report by the Rt. Hon. Sir Austen Chamberlain, M.P. (British Representative). (*Miscellaneous No. 4*, 1926.) [*Cmd. 2646.*] 3d. (3½d.)
- Fortieth Session of the Council. Report by the Rt. Hon. Sir Austen Chamberlain, M.P. (British Representative). (*Miscellaneous No. 8*, 1926.) [*Cmd. 2694.*] 3d. (3½d.)
- Forty-First and Forty-Second Sessions of the Council. Report by the Rt. Hon. Sir Austen Chamberlain, M.P. (British Representative). (*Miscellaneous No. 9*, 1926.) [*Cmd. 2761.*] 4d. (4½d.)
- Papers respecting the work of the Permanent Mandates Commission. (*Miscellaneous No. 10*, 1926.) [*Cmd. 2767.*] 4d. (4½d.)
- Preparatory Commission for the Disarmament Conference. Report to the Council on the Work of the First Session. Geneva, May 26, 1926. (*Miscellaneous No. 7*, 1926.) [*Cmd. 2681.*] 2d. (2½d.)
- Special Assembly, Geneva, March 8–17, 1926. Report of the British Delegates. London, April 19, 1926. (*Miscellaneous No. 5*, 1926.) [*Cmd. 2648.*] 6d. (6½d.)
- Lithuania.** See Memel.
- Locarno.** Treaty of mutual guarantee between the United Kingdom, Belgium, France, Germany, and Italy. Locarno, October 16, 1925. (Ratifications deposited at Geneva, September 14, 1926.) (*Treaty Series, No. 28*, 1926.) [*Cmd. 2764.*] 3d. (3½d.)
- Mandates.** See League of Nations.
- Memel.** Convention between the British Empire, France, Italy, Japan and Lithuania regarding the Memel Territory, signed at Paris, May 8, 1924, together with the Statute of the Memel Territory. (*Treaty Series No. 48*, 1925.) [*Cmd. 2541.*] 3d. (3½d.)
- Mosul.** Decision relating to the Turco-Iraq Frontier adopted by the Council of the League of Nations at Geneva on December 16, 1925. (*Miscellaneous No. 17*, 1925.) [*Cmd. 2562.*] 2d. (2½d.)
- Memorandum on the Enquiry conducted by MM. Ortega-Nunez, Markus and Charrère into the Deportation of Christians in the neighbourhood of the Brussels Line, November 23, 1925. (*Miscellaneous No. 18*, 1925.) [*Cmd. 2563.*] 2d. (2½d.)

- Mosul. Report by M. Uden to the League of Nations on the question of the Turco-Iraq Frontier. Geneva, December 16, 1925. (*Miscellaneous No. 20, 1925.*) [*Cmd. 2565.*] 3d. (3½d.)
- Report to the Council of the League of Nations on the situation in the locality of the provisional line of the frontier between Turkey and Iraq fixed at Brussels on October 29, 1924. (*Miscellaneous No. 15, 1925.*) [*Cmd. 2557.*] 2d. (2½d.)
- Treaty between the United Kingdom and Iraq and Turkey regarding the settlement of the Frontier between Turkey and Iraq, together with Notes exchanged. Angora, June 5, 1926. (*Turkey No. 1, 1926.*) (With a map.) [*Cmd. 2679.*] 9d. (10d.)
- Turco-Iraq Frontier. Letter from His Majesty's Government to the Secretary General of the League of Nations and Proceedings of the Council of the League regarding the determination of the Turco-Iraq Frontier and the application to Iraq of the Provisions of Article 22 of the Covenant of the League. (*Miscellaneous No. 3, 1926.*) [*Cmd. 2624.*] 3d. (3½d.)
- Netherlands. Agreement between the United Kingdom and the Netherlands for the Reciprocal Exemption from Income Tax in certain cases of profits accruing from the Business of Shipping. London, May 20, 1926. (*Treaty Series No. 14, 1926.*) [*Cmd. 2669.*] 1d. (1½d.)
- Agreement between the United Kingdom and the Netherlands regarding Sanitary Control over Mecca pilgrims at Kamaran Island. Paris, June 19, 1926. (*Treaty Series No. 26, 1926.*) [*Cmd. 2741.*] 3d. (3½d.)
- Notes exchanged between the United Kingdom and the Netherlands extending to the States of Johore and Kedah the extradition treaty between the United Kingdom and the Netherlands of April 13, 1920. The Hague, September 23–October 3, 1925. (*Treaty Series No. 49, 1925.*) [*Cmd. 2542.*] 1d. (1½d.)
- See also Canada.
- Obscene Publications. International Convention for the Suppression of the Circulation of and Traffic in Obscene Publications. Geneva, September 12, 1923. (*Treaty Series No. 1, 1926.*) [*Cmd. 2575.*] 3d. (3½d.)
- Oil Pollution. Oil Pollution of Navigable Waters. International Conference at Washington, June, 1926. Final Act (and Annex) signed June 16, 1926. [*Cmd. 2702.*] 3d. (3½d.)
- Palestine. Convention between the United Kingdom and the United States of America respecting the rights in Palestine of the Governments of the two countries and their nationals. London, December 3, 1924. (*Treaty Series No. 54, 1925.*) [*Cmd. 2559.*] 3d. (3½d.)
- Permanent Court of International Justice. Question of Accession of the United States of America to the Protocol of December 16, 1920. (*Miscellaneous No. 11, 1926.*) [*Cmd. 2776.*] 6d. (6½d.)
- Portugal. Agreement between the United Kingdom and Portugal in regard to tonnage measurement of Merchant Ships, together with Notes exchanged, London, May 20, 1926. (*Treaty Series No. 15, 1926.*) [*Cmd. 2670.*] 1d. (1½d.)
- See also Rhodesia, South-West Africa.
- Reparation. Agreement regulating the amounts to be allocated out of the second Dawes Annuity for the Armies of Occupation in the Rhineland, the Inter-Allied Rhineland High Commission, and the Inter-Allied Military Commission of Control in Germany. Paris, September 21, 1925. (*Miscellaneous No. 15, 1925.*) [*Cmd. 2558.*] 2d. (2½d.)
- Rhodesia. Notes exchanged between Portugal and the United Kingdom confirming the protocol signed at Cape Town on March 5, 1915, defining a section of the frontier line between the Portuguese Colony of Angola and Rhodesia. Lisbon, November 3, 1925. (*Treaty Series No. 55, 1925.*) [*Cmd. 2568.*] 2s. (2s. 1d.)
- Serb-Croat-Slovene Kingdom. Notes exchanged between the United Kingdom and the Serb-Croat-Slovene Kingdom to regulate the commercial relations between the two countries. Belgrade, June 18, 1926. (*Treaty Series No. 25, 1926.*) [*Cmd. 2732.*] 2d. (2½d.)
- Siam. Notes exchanged between United Kingdom and Siam in connection with the general and commercial Treaties between the United Kingdom and Siam. Signed at London, July 14, 1925. (*Treaty Series No. 9, 1926.*) [*Cmd. 2644.*] 2d. (2½d.)

- Siam. Treaty between the United Kingdom and Siam for the revision of their Mutual Treaty arrangements and Protocol concerning Jurisdiction applicable in Siam to British subjects, &c. Signed at London, July 14, 1925. (Ratifications exchanged in London, March 30, 1926.) (*Treaty Series No. 7, 1926.*) [*Cmd. 2642.*] 2d. (2½d.)
- Treaty of Commerce and Navigation between the United Kingdom and Siam, signed at London, July 14, 1925. (Ratifications exchanged in London, March 30, 1926.) (*Treaty Series No. 8, 1926.*) [*Cmd. 2643.*] 3d. (3½d.)
- Somaliland. Notes exchanged between the United Kingdom and Italy respecting the deportation of British Somali subjects expelled from Italian Somaliland and of Italian Native subjects of Italian Somaliland expelled from Aden. London, December 14, 1925, and January 29, 1926. (*Treaty Series No. 4, 1926.*) [*Cmd. 2617.*] 1d. (1½d.)
- South-West Africa. Agreement between the Government of the Union of South Africa and the Government of the Republic of Portugal in relation to the Boundary between the Mandated Territory of South-West Africa and Angola. (*Treaty Series No. 29, 1926.*) [*Cmd. 2777.*] 1d. (1½d.)
- Agreement between the Government of the Union of South Africa and the Government of the Republic of Portugal regulating the use of the water of the Kunene River for the purposes of generating hydraulic power and inundation and irrigation in the Mandated Territory of South-West Africa. (*Treaty Series No. 30, 1926.*) [*Cmd. 2778.*] 2d. (2½d.)
- Spain. Notes exchanged between the United Kingdom and Spain respecting the duration of the Treaty of Commerce and Navigation between the United Kingdom and Spain, of October 31, 1922. Madrid, October 22, 1926. (*Treaty Series No. 27, 1926.*) [*Cmd. 2753.*] 1d. (1½d.)
- Sudan. Papers relating to Slavery in the Sudan. (*Sudan No. 1, 1926.*) [*Cmd. 2650.*] 4d. (4½d.)
- Tanganyika Territory. Convention between the United Kingdom and the U.S.A. respecting the Rights of the Governments of the two countries and their respective Nationals in the former German Colony of East Africa. Signed at London, February 10, 1925. (Ratifications exchanged at London, July 8, 1926.) (*Treaty Series No. 22, 1926.*) [*Cmd. 2729.*] 2d. (2½d.)
- Togoland. Conventions between the United Kingdom and the U.S.A. respecting the Rights of the Governments of the two countries and their respective Nationals in part of the former German Protectorate of Togoland. Signed at London, February 10, 1925. (Ratifications exchanged at London, July 8, 1926.) (*Treaty Series No. 24, 1926.*) [*Cmd. 2731.*] 2d. (2½d.)
- Tsana Lake. Notes exchanged between the United Kingdom and Italy respecting Lake Tsana. Rome, December 14–20, 1925. (*Treaty Series No. 16, 1926.*) [*Cmd. 2680.*] 3d. (3½d.)
- Treaties, &c., between the United Kingdom and Foreign States. Accessions, Withdrawals, &c. (*Treaty Series No. 56, 1925.*) [*Cmd. 2577.*] 4d. (4½d.)
- Turkey. *See* Mosul.
- Union of South Africa. *See* South-West Africa.
- United States of America. Correspondence between His Majesty's Government and the United States Government regarding Administrative Measures to be taken by British Authorities in order to assist the United States Government in the Prevention of Liquor Smuggling from the Sea. Washington, March 27–April 26, 1926. (*United States No. 1, 1926.*) [*Cmd. 2647.*] 2d. (2½d.)
- Correspondence between the United Kingdom and the U.S.A. respecting Proposed Reduction of Passport Fees. (*United States No. 2, 1926.*) [*Cmd. 2746.*] 2d. (2½d.)
- *See also* Cameroons, Palestine, Permanent Court of International Justice, Tanganyika Territory, Togoland.
- Venereal Disease. Treatment of Venereal Disease. Agreement respecting facilities to be given to Merchant Seamen. Signed at Brussels, December 1, 1924. (British Ratification deposited August 21, 1925.) (*Treaty Series No. 20, 1926.*) [*Cmd. 2727.*] 3d. (3½d.)

SUMMARY OF EVENTS¹

For the year 1926

COMPILED BY THE ROYAL INSTITUTE OF INTERNATIONAL AFFAIRS.

Abbreviations.

A. J. I. L., *American Journal of International Law*. *Cmd.*, *Great Britain, Parliamentary Papers*. *E. N.*, *L'Europe Nouvelle*. *F. F.*, *Feuille Fédérale* (Swiss). *L. N. O. J.*, *League of Nations Official Journal*. *L. N. T. S.*, *League of Nations Treaty Series*. *T.*, *The Times* (London).

Abyssinia.

1926. June 9. Notes exchanged between British and Italian Governments on Dec. 14 and 20, 1925, relating to the development of their economic interest in Abyssinia, communicated to Ras Tafari Makonnen, Regent of Abyssinia, by British and Italian Ministers at Addis Abeba.
- June 19. Ras Tafari sent British and Italian communications to League of Nations together with note to be forwarded to States Members, protesting against Anglo-Italian agreement, which had been concluded without knowledge of Abyssinian Government.
- August 3. British Government sent note to League disclaiming any intention to exert pressure on Abyssinian Government.
- August 7. Similar note sent by Italian Government to League.
- Sept. 4. Ras Tafari sent note to League asking that all correspondence should be published. (*Texts* : *L. N. O. J.*, Nov. 1926.)
- Oct. 2. Agreement with Netherlands concerning diplomatic and consular officials concluded by exchange of notes.

Afghanistan.

1926. Feb. 28. Russian troops which had at end of 1925 occupied island formed by two branches of river Oxus round Darkad, in Badakshan, withdrawn pending decision of Soviet-Afghan Commission as to ownership of island ; island occupied by Afghan troops.
- March 3. Treaty of Friendship and Commerce with Germany signed at Berlin. Ratifications exchanged, Sept. 15.
- Aug. 31. Treaty of neutrality and mutual non-aggression with U. S. S. R. signed at Pagman.

Albania.

1926. Jan. 21. Ratifications exchanged of Treaty of Commerce and Navigation with Italy of Jan. 20, 1924, and of Establishment and Consular convention of Feb. 29, 1924.
- Feb. 6. Notes exchanged with Great Britain concerning renunciation by British Government of extraterritorial and judicial rights in Albania.
- March 8. Passport agreement with United States signed at Tirana.
- June 22. Treaty of Commerce and Navigation with Serb-Croat-Slovene State initialled, together with Customs, Extradition, Consular and Frontier Traffic conventions.
- July 30. Final Act concerning Delimitation of Frontiers signed at Paris by Albania, France, Great Britain, Greece, Italy, Japan, and Serb-Croat-Slovene State.

¹ The information given has been collected from newspapers and other sources, and it has not been possible in every case to test its accuracy. References in brackets indicate where texts are to be found.

- Oct. 13. Three conventions with Greece signed : (1) Commerce and Navigation ; (2) Consular and Establishment ; (3) Nationality ; together with protocols concerning transit facilities and telegraphic and postal communications.
- Nov. 20. Revolt broke out among Catholic tribes in Northern Albania.
- Nov. 27. Treaty of Friendship and Security with Italy signed at Tirana. (*E.N.* Jan. 8, 1927.)

Arabia.

1926. Jan. 11. Wahhabi Sultan Ibn Sa'ud proclaimed King of Hedjaz at Mecca. Ibn Sa'ud recognized as King of Hedjaz by British, French, and Soviet Governments before March 9.

Argentina.

1926. June 24. Arrangement regarding diplomatic mails concluded with Switzerland by exchange of notes of June 3 and 24.
- June 29. Treaty of friendship with Turkey signed at Rome.

Austria.

1926. Jan. 21. Agreement with United States concerning passport visas signed at Vienna.
- March 4. Ratifications exchanged with Rumania of juridical convention of Feb. 17, 1925.
- March 5. Conciliation and arbitration treaty with Czechoslovakia signed at Vienna. Ratifications exchanged May 31.
- March 6. Ratifications exchanged of treaty with Sweden of May 25, 1925, concerning application of previous treaties relating to judicial relations. (*L.N.T.S.* XLVII.)
- March 15. Protocol of June 29, 1923, concerning the division of the pre-war Austro-Hungarian debt among the Successor States, came into force.
- March 22. Ratifications exchanged of convention of June 18, 1924, with Czechoslovakia, concerning obligations contracted in Austro-Hungarian Crowns, of additional protocol of May 14, 1925, and of convention of July 12, 1924, concerning insurance credits.
- April 13. Ratifications exchanged of Air Navigation convention with Hungary of Aug. 29, 1924.
- May 28. Arbitration treaty with Sweden signed.
- June 9. League of Nations Council decided that control of Austria under reconstruction plan should terminate on June 30.
- June 12. Financial convention with Czechoslovakia signed. Came into force June 25.
- July 7. Ratifications exchanged with Italy of (1) agreement of Feb. 23, 1925, for systematization of interests in the Tyrol ; (2) agreement of June 24, 1925, for systematization of interests in Carinthia ; (3) agreement of June 24, 1925, concerning hunting rights in the boundary zone as fixed by the Treaty of St. Germain.
- Oct. 18. Ratifications exchanged of convention of Sept. 18, 1925, with Prussia concerning the introduction of reciprocal obligatory education.

Belgium.

1926. April 27. The Chinese Minister at Brussels notified the Belgian Government of the decision taken by the Chinese Government to denounce as from Oct. 27 the unilateral treaty of 1865 concerning customs, extraterritoriality and establishment of Belgian nationals. Nov. 6, Chinese presidential order issued declaring treaty abrogated from Oct. 27. Nov. 22, Chinese note handed to Belgian Government rejecting Belgian proposal for combined submission of dispute to Permanent Court of International Justice. Nov. 26, Belgium instituted proceedings against China before Permanent Court.
- May 5. Agreement with France and Great Britain concerning customs regulations applicable to air traffic signed in Paris. (*Cmd.* 2664.)
- May 22. Treaty signed between France, Great Britain, the Netherlands, and Belgium abrogating the treaty of 1839. Air Navigation agreement with Germany signed.

June 26. Ratifications exchanged of agreement with Poland of Sept. 1, 1925, concerning scientific and literary relations. Came into force July 11.

July 1. Agreement between Germany, Belgium, and Luxemburg concerning use of passports in frontier districts signed. Ratifications exchanged and additional agreement signed on July 29.

Bulgaria.

1926. Feb. 6. Agreement signed between representatives of Bulgaria, Greece, and Sweden, by which Sweden, in accord with the League of Nations, placed two Swedish officers at the disposal of the Greek and Bulgarian Governments to supervise the Graeco-Bulgarian frontier.

Half the indemnity for the Graeco-Bulgarian frontier incident of Oct. 1925 was paid on Feb. 15, the other half on March 1.

June 10. League Council approved the scheme drawn up by the League Finance Committee concerning Bulgarian refugee settlement. Aug. 25, Provisional agreement between Bank of England and Bulgarian Government signed, whereby the Bank will advance £400,000 to Bulgaria subject to the approval of the League. Sept. 20, League of Nations Council approved scheme for issue of loan of £2,250,000 for refugee settlement under League guarantee and appointed a commissioner; protocol signed by Bulgarian representative. Sept. 29, Protocol ratified by Bulgarian Sobranje. Dec. 17, Agreement for loan ratified by Sobranje.

July 29. Bulgarian Komitaji raided Serb-Croat-Slovene territory near Kriva Palanka. Aug. 11, Joint note presented to Bulgaria by Greece, Serb-Croat-Slovene State and Rumania asking for suppression of revolutionary organizations and prevention of border raiding. Aug. 27, Bulgaria replied to the collective note. Sept. 11, Joint acknowledgment of the reply sent to Bulgaria.

Chile.

1926. Tacna-Arica controversy.

Jan. 12. Announced that Major-General William Lassiter had been appointed to succeed General Pershing as head of Plebiscite Commission. Jan. 15, Chile appealed to President Coolidge as arbitrator against resolution of Plebiscite Commission of Dec. 9, 1925. Jan. 29, President Coolidge dismissed Chilean appeal. Feb. 5, Both Chile and Peru appealed against the election law adopted by the Plebiscite Commission. Feb. 25, President Coolidge gave decision upholding Commission's election regulations. March 11, Peruvian Government asked Chairman of Plebiscite Commission for indefinite postponement of plebiscite due to begin on March 15. March 14, Plebiscite Commission decided to postpone registration of voters until March 27. March 26, U.S. Secretary of State announced that Governments of Chile and Peru had accepted good offices of United States for settlement of the controversy. June 15, Plebiscite Commission approved resolution proposed by General Lassiter declaring plebiscite in disputed provinces to be impossible owing to frustration by Chile of carrying out of arbitrator's award. June 18, Chilean Government notified State Department of its withdrawal from direct negotiations which had been taking place in Washington since end of March. Nov. 30, U. S. Secretary of State sent memorandum to Chile and Peru suggesting cession of disputed territories to Bolivia, Bolivia repaying Chile for all money expended on improvements. (Text: *New York Times*, Dec. 2, 1926.) Dec. 3, Reported that Bolivian Government was in favour of U.S. proposal. Dec. 4, Chilean Government communicated to Secretary of State its acceptance in principle of U.S. proposal. (Text: *New York Times*, Dec. 6, 1926.) Dec. 6, Peru asked State Department what part self-determination would play in proposed settlement.

China.

1926. Boxer Indemnity.

Jan. 7. Foreign Office announced constitution of Statutory Committee to advise on best use of funds, and decision that delegation of three Chinese and three British members under chairmanship of Lord Willingdon should study whole question in China. June 18, Report of Lord Willingdon's Delegation signed. Oct. 18, Report of Advisory Committee analysing Lord Willingdon's report presented to Secretary of State for Foreign Affairs. (Texts: *Cmd.* 2766.)

- Jan. 10. Unofficial negotiations for settlement of Hongkong boycott broke down owing to pressure by Canton extremists.
- Jan. 12. The International Commission on extra-territoriality (in China) held its opening session at Peking. Sept. 16, Commission's report unanimously adopted. (*Cmd. 2774.*)
- Jan. 21. Marshal Wu Pei-fu, acting in agreement with Marshals Chang Tso-lin and Sun Chuan-fang, began his advance from Hupei Province against Peking.
- Jan. 21. Chinese Eastern Railway dispute. M. Ivanov, General Manager of the railway, arrested by Chang Tso-lin as result of dispute with Russian authorities of the railway over payment for transport of troops. Jan. 23, M. Karakhan, Soviet Ambassador, sent note to Peking Government demanding release of M. Ivanov within three days, at the same time the Soviet Commissar for Foreign Affairs wrote direct to Marshal Chang Tso-lin. Jan. 24, Agreement reached for release of M. Ivanov and other arrested Russians and resumption of traffic. June 5, Sino-Soviet discussions which had been taking place at Mukden regarding Chinese Eastern Railway broke down owing to Chang Tso-lin's refusal to agree to Soviet demands.
- Feb. 21. Commissioner of Chinese Maritime Customs at Canton announced closing of port of Canton owing to seizure of cargo by strikers. Feb. 25, Seized goods surrendered and port reopened.
- March 4. Peking Government denounced French treaties dealing with Indo-China frontier.
- March 9. Foreign shipping fired on by Taku Forts, and mines reported to have been laid at entrance to Peiho River leading up to Tientsin.
- March 10. Diplomatic protest presented to Peking Foreign Office in view of violation of 1901 Protocol.
- March 13. Two Japanese destroyers fired on by Kuominchun forces in Taku forts.
- March 16. Diplomatic Body at Peking authorized naval commanders of the Powers in Tientsin to present ultimatum to the rival Chinese commanders at Taku, demanding free access to the sea by the river from Tientsin, discontinuance of hostilities there and of search of ships, and the removal of mines from Peiho. March 18, Peking Government and rival commanders accept demands of Diplomatic Body.
- March 18. Students' riots at Peking; police guarding the Cabinet fired on students, killing about 40.
- March 20. Coup d'état at Canton. General Chiang Kai-shek arrested Russian extremists and strike leaders; Canton Government notified Hongkong that they would appoint a delegation to settle the boycott.
- March 20. Cabinet (Premier Chia Teh-yao) resigned.
- March 22. Kuominchun forces retreated from Tientsin, but remained in possession of Peking.
- March 23-April 15. "Siege" of Peking.
- April 6 and 16. Diplomatic Body protest against aerial bombardment of Peking.
- April 6. Peking Government notified to Belgian Government their desire to revise Treaty of 1865, or failing revision to denounce it.
- April 10. "Chief Executive" Tuan Chi-jui deposed by Kuominchun. Kuominchun invited Wu Pei-fu to take control in Peking, but Wu declined. April 15, Kuominchun evacuated Peking. April 20, Tuan Chi-jui ceased finally to function as Chief Executive and left for Tientsin.
- April 12. Collapse of boycott negotiations owing to Hongkong's refusal to pay strike compensation.
- April 25. Second coup d'état by General Chiang Kai-shek, this time against the Moderates.
- May 13. Dr. W. W. Yen became Premier and inaugurated a "Regency Cabinet" in the absence of any recognized head of the Chinese Republic.
- May 15. Kuomintang Convention at Canton; resolution passed making Communists ineligible as departmental chiefs in Kuomintang Party.
- June 1. Kuomintang Party issued proclamation ordering new Canton Foreign Minister, Eugene Chen, to institute negotiations for ending the strike. Hongkong Government accepted this invitation.
- June 4. Revenues of the salt gabelle at Tientsin taken over by local Military Governor.

- June 23. W. W. Yen resigned Premiership and was succeeded by Tu Hsi-kuei.
- June 28. Inconclusive meeting at Peking between Marshals Chang Tso-lin and Wu Pei-fu.
- July 13. Tang Sheng-chih, in alliance with Cantonese, occupied Changsha, defeating Wu Pei-fu's troops.
- July 15. Opening of general "allied" attack on Kuominchun.
- July 15. Hongkong-Canton negotiations opened.
- July 23. Peking Tariff Conference adjourned *sine die* at an informal meeting of the delegates.
- July 25. Hongkong-Canton negotiations suspended for consideration of proposals made on either side.
- Aug. 13. Diplomatic Body (subject to reservation by Italian Minister) approved draft agreement for rendition of Shanghai Mixed Court.
- Aug. 14. Defeat of Kuominchun at the Nankou Pass.
- Aug. 17. Chang Tso-lin's forces occupied Kalgan.
- Aug. 18. Canton-Hunan forces captured Yochow.
- Aug. 28. Announcement by Kuomintang that General Feng Yu-hsiang (leader of Kuominchun) had been admitted into the Party and was in alliance with Canton.
- Sept. 1-Oct. 11. Siege of Wuchang; the sister cities of Hanyang and Hankow were occupied by the Cantonese early in September.
- Sept. 2. Chinese authorities at Harbin seized vessels belonging to the Chinese Eastern Railway and dissolved the railway's education department.
- Sept. 4. British naval forces at Canton and Swatow cleared away strike picket boats and expelled strike pickets from British-owned wharves at Canton.
- Sept. 5. Wanh sien "incident". In attempting to release British ships, which had been seized (with their officers) by the local general, Yang Sen, British naval forces clashed with Chinese troops and bombarded Wanh sien city. Casualties: British, 8 killed (7 naval, 1 civilian), 15 wounded; Chinese, military (killed and wounded) about 260, civilians, under 100 killed, about 140 wounded.
- Sept. 11. M. Karakhan, Soviet Ambassador at Peking, departed, after his recall had been demanded by the Peking Government.
- Sept. 12. British naval guards withdraw from Canton wharves.
- Sept. 17-Oct. 15. Series of engagements round Nanchang between Cantonese and troops of Marshal Sun Chuan-fang.
- Sept. 18. Canton Foreign Minister informed British Consul-General that boycott would be ended on or before October 10, and that simultaneously 2½% surtaxes (5% on luxuries) would be levied on foreign goods.
- Sept 27. Agreement for rendition of Shanghai Mixed Court published.
- Oct. 2. Dr. Wellington Koo appointed Acting Premier and Acting Minister for Foreign Affairs.
- Oct. 10. Canton Strike Committee and Kuomintang Executive announced end of boycott, but continuance of anti-Imperialist struggle; strike pickets withdrawn.
- Oct. 11. New surtaxes levied by Canton Government.
- Oct. 16-19. Revolt in Chekiang Province against Marshal Sun Chuan-fang suppressed.
- Oct. 21. Peking Government demanded revision of Sino-Japanese Treaty of 1896—commercial clauses of which fell due for reconsideration on Oct. 20. Nov. 10, Japanese Government replied that they would consider revision of tariff and commercial articles of China Treaty.
- Nov. 3. Declaration by Diplomatic Body at Peking that they could not recognize the legality of the Canton surtaxes.
- Nov. 5. Cantonese occupied Kiukiang; Sun Chuan-fang's army in retreat, withdrawing from whole province of Kiangsi.
- Nov. 6. Peking Government informed Belgian Minister that 1865 Treaty must be considered as terminated; Belgian Government proposed laying question before Permanent Court of International Justice at The Hague and took steps accordingly.
- Nov. 17. Outbreak of labour troubles and strikes at Hankow.
- Nov. 18. Military Council of Chang Tso-lin, Chang Tsung-chang and Sun Chuan-fang at Tientsin decided on united action against the Cantonese.
- Nov. 23. Arrest of 14 persons connected with the Kuomintang in British Concession

- at Tientsin for seditious activities; they were handed over to the Chinese authorities.
- Dec. 2. Eugene Chen and other Kuomintang leaders arrived at Wuchang.
- Dec. 3. Cantonese occupied Foochow and extended their power over Fukien province; by the end of the month they had advanced to neighbourhood of Hangchow in Chekiang.
- Dec. 8-17. Conversations between Mr. Lampson (new British Minister to China) and Eugene Chen at Hankow.
- Dec. 18. Statement of British policy read to Diplomatic Body at Peking, recommending unconditional grant of surtaxes promised by Washington Conference, and early steps towards Treaty revision.
- Dec. 20. Nationalist demonstrations at Hankow; anti-Imperialist speeches by Russian adviser, Borodin, and Sun Fo (son-in-law of Sun Yat-sen): Eugene Chen asked British General for removal of barricades at entrance of British concession.
- Dec. 26. British statement of policy published.

Czechoslovakia.

1926. Jan. 2. Conciliation and arbitration agreement with Sweden signed. Ratifications exchanged April 29. (*L. N. T. S. XLVIII.*)
- Jan. 15. Ratifications exchanged with Rumania of protocol of April 16, 1925, concerning property in frontier zones. (*L. N. T. S. XLVI.*)
- Feb. 8. Czechoslovakia officially recognized the Soviet Government.
- March 29. Ratifications exchanged with Great Britain of convention of Nov. 11, 1924, concerning legal proceedings in civil and commercial matters. (*Cmd. 2637; L. N. T. S. XLVIII.*)
- April 14. Ratifications exchanged with Poland of legal and financial convention and arbitration convention of April 23, 1925. (*L. N. T. S. XLVII.*)
- April 15. Air Navigation agreement with Poland signed.
- June 14. Protocol signed at Bucharest renewing for three years the convention of alliance with Rumania of April 23, 1921, and with Serb-Croat-Slovene Kingdom of Aug. 14, 1920. Ratifications exchanged June 17.
- July 6. Judicial convention with Latvia signed.

Danzig (Free City of).

1926. Sept. 21. Agreement with Poland for division of Customs duties signed.

Denmark.

1926. Jan. 14. Convention with Sweden for pacific settlement of disputes signed. Ratifications exchanged July 20.
- Jan. 15. Convention with Norway for pacific settlement of disputes signed.
- Jan. 30. Convention with Finland for pacific settlement of disputes signed. Ratifications exchanged July 26.
- June 2. Treaty of arbitration and conciliation with Germany signed.
- July 5. Arbitration agreement with France, replacing that of Aug. 9, 1911, signed.
- July 23. Provisional air navigation agreement with the Netherlands signed.

Egypt.

1926. Jan. 21. Senner Dam opened.
- Feb. 7. Oasis of Jarabub occupied by Italian troops.
- May 15-19. The Caliphate Congress held at Cairo.
- Nov. 9. Protocol signed regarding interpretation of Italo-Egyptian treaty of Dec. 6, 1925, fixing frontier between Egypt and Cyrenaica.
- Dec. 21. Port Fuad on the Red Sea opened.

Estonia.

1926. Feb. 25. Ratifications exchanged of conciliation convention with Sweden of May 29, 1925. (*L. N. T. S. XLVI.*)
- Dec. 10. League of Nations Council approved scheme for issue of an international loan to Estonia under auspices of League. Protocol relating to conditions signed by Estonian representative.

Finland.

1926. Jan. 5. Ratifications exchanged with Sweden of convention of May 9, 1925, concerning reindeer in frontier districts. (*L. N. T. S.* XLVII.)
- Jan. 27. Ratifications exchanged of arbitration and conciliation treaty with Germany of March 14, 1925.
- Jan. 29. Convention with Sweden for pacific settlement of disputes signed. Ratifications exchanged May 28.
- Feb. 3. Convention with Norway for pacific settlement of disputes signed.
- Feb. 27. Ratifications exchanged with the Netherlands of convention of March 9, 1925, concerning the admission of Finnish consuls to Netherlands colonies. (*L. N. T. S.* XLVII.)
- May 18. Ratifications exchanged with Norway of conventions of Feb. 14, 1925, concerning timber floating on the Pasvik river, and juridical régime of waters of the Pasvik and Jakobselv.
- Aug. 30. Protocol signed at Helsingfors regarding Article 14 of convention of arbitration and conciliation with Germany of March 14, 1925. (*L. N. T. S.* XLV.)
- Sept. 17. Ratifications exchanged with Latvia of declaration of June 7, 1924, concerning reciprocal application of Hague Convention of July 7, 1905, relating to several matters of Private International Law.
- Nov. 24. Ratifications exchanged of treaty of amity with Turkey of May 19, 1925.

France.

1926. Jan. 16. Agreement with Luxemburg concerning taxation of nationals signed in Paris. (*L. N. T. S.* XLVIII.)
- May 22. Convention with Germany concerning Air Navigation signed.
- May 25. Ratifications exchanged with Spain of declaration of June 2, 1924, concerning the fishing in the Bidassoa.
- May 27. Convention with Saar Governing Commission regarding workmen's compensation signed at Saarbrück.
- June 10. Treaty of friendship and arbitration with Rumania signed in Paris.
- July 12. Agreement regarding French war debt to Great Britain signed in London.
- July 13. Moroccan agreement with Spain signed in Paris.
- Aug. 2. The French steamer *Lotus* collided with a Turkish collier near Mitylene. On arrival of *Lotus* at Constantinople, Lieutenant Desmons, French Officer in charge of watch when collision took place, arrested by Turkish authorities on charge of manslaughter. Aug. 28, Trial began before Constantinople Penal Court; Lieut. Desmons claimed to be tried by French Court. Sept. 13, Lieut. Desmons released on bail, as result of protests made by French Government. Sept. 15, Lieut. Desmons sentenced to 80 days' imprisonment by Turkish Court, but allowed at large.
- Oct. 14. Franko-Turkish agreement signed at Geneva for submission to arbitration of dispute arising out of *Lotus* incident.
- Aug. 27. Agreement with Switzerland concerning backwash of the Rhine from Kembs to Bâle signed.
- Aug. 27. Declaration concerning the exchange of civil state acts with Switzerland signed.

Germany.

1926. Jan. 6. Air conference between France, Great Britain, Italy, Japan, Belgium and Germany opened in Paris. May 22, Agreement signed laying down rules for German commercial aircraft. Aug. 31. Conference of Ambassadors informed Germany that the Inter-Allied Aeronautical Guarantee Committee would cease activities as from Sept. 1.
- Jan. 7. Notes exchanged between Norway and Germany on Oct. 19, 1925, Nov. 3, 1925, and Jan. 7, 1926, regarding reciprocal rights of sojourn for the nationals of the respective countries.
- Jan. 12. Protocol signed constituting provisional agreement for the seasonal immigration of Polish agricultural workers into France during 1926. Dec. 9. Agreement for 1927 signed at Berlin.
- Feb. 1. Ratifications exchanged with Mexico of the Claims Convention of March 16, 1925.

- April 24. Treaty of friendship and neutrality with U. S. S. R. signed at Berlin. Notes exchanged relating thereto on same date. Ratifications exchanged June 29.
- May 5. Ratifications exchanged of convention with Lithuania of May 31, 1923, relating to settlements of outstanding questions.
- May 20. Arbitration treaty with the Netherlands signed at The Hague.
- Aug. 17. Agreement signed with Poland as to the administration of the frontier territories of the Oder.
- Sept. 10. Amnesty agreement signed by Inter-Allied Rhineland High Commission and Reichskommissar for occupied territories.
- Oct. 6. Provisional contract signed between the Hohenzollerns and the Prussian Government for settlement of questions regarding Hohenzollern property. Law embodying agreement came into force on Oct. 30.
- Dec. 12. Agreement with the Principal Allied Powers for withdrawal of Inter-Allied Military Mission of Control from Germany on Jan. 31, 1927, and replacement of Allied control by investigation by League of Nations.
- Dec. 21. Notes exchanged with Poland in Warsaw concerning settlement of questions arising out of agreement of Aug. 30, 1924, on nationality questions.
- Dec. 22. Convention with Poland concerning the restoration of the Polish archives signed.
- Dec. 29. Treaty of conciliation and arbitration with Italy signed at Rome.

Greece.

1926. June 23. Commercial arrangement with U. S. S. R. signed. Came into force July 20.
- Aug. 17. Defensive treaty of friendship and conciliation with Serb-Croat-Slovene Kingdom signed in Athens, with four railway conventions.
- Nov. 6. Protocol concerning the delimitation of the Turco-Greek frontier signed at Athens.
- Dec. 1. Graeco-Turkish convention signed regarding property of Greeks in Turkey and Turks in Greece.
- Dec. 30. Contract with Great Britain for new naval mission signed.

Hungary.

1926. June 10. League of Nations Council decided, on recommendation of Financial Committee, to terminate control over Hungarian finances and withdraw its Commissioner-General at Budapest from June 30, 1926.
- July 24. Agreement with Serb-Croat-Slovene State signed : (1) concerning exchange of political prisoners ; Final Protocol signed July 28 ; (2) Commercial agreement, together with veterinary convention and five conventions concerning management of frontier stations, railways and bridges.

Iraq.

1926. Jan. 13. Treaty with Great Britain signed in Baghdad providing for continuance of special relations for twenty-five years, in accordance with League of Nations decision of Dec. 16, 1925, regarding frontier between Iraq and Turkey. Ratifications exchanged on March 30, 1926. (*Cmd.* 2662 ; *L. N. T. S.* XLVII.)
- June 5. Treaty between Great Britain, Iraq and Turkey signed at Angora regarding the settlement of the frontier between Iraq and Turkey. (*Cmd.* 2679.)

Italy.

1926. Jan. 25. Senate adopted Emigrants Bill depriving of the rights of citizenship those Italians abroad who commit acts damaging to Italian interests.
- Jan. 29. Notes exchanged with Great Britain on Dec. 14, 1925, and Jan. 29, 1926, respecting the deportation of British Somali subjects expelled from Italian Somaliland and of Italian native subjects expelled from Aden. (*L. N. T. S.* XLVII.)
- May 25. Agreement with Sweden concluded by exchange of notes on May 7 and 25, concerning exemption of Legations from taxation.
- Aug. 7. Convention of arbitration with Spain signed. Ratifications exchanged Oct. 16.
- Aug. 10. Juridical convention with Turkey signed in Rome.

Sept. 2. Convention of friendship and commerce with Imam of San'a, King of the Yaman, signed at San'a.

Sept. 17. Treaty of friendship and collaboration with Rumania signed.

Latvia.

1926. June 18. Ratifications exchanged of declaration with Sweden of Nov. 15, 1924, regarding reciprocal application of Hague Convention relating to civil procedure.

League of Nations.

1926. Jan. 12-29. Second session of Committee of Experts for Progressive Codification of International Law held at Geneva. Ten sub-committees appointed to study certain questions.

Jan. 16. Institute of Intellectual Co-operation in Paris officially inaugurated.

Feb. 10. Formal application from Germany for admission into League received by Secretary General. Feb. 12, Council, meeting in extraordinary session, decided to convene special session of Assembly for March 5 to consider Germany's application.

Feb. 16-March 6. Permanent Mandates Commission met in Rome to examine French Government's report on administration of Syria.

March 8-19. Thirty-ninth session of the Council held in Geneva. Council failed to agree on question of its composition. Statute for Rome Institute for Unification of Private Law adopted.

March 8-17. Special session of Assembly held. Decided to postpone question of admission of Germany until September owing to disagreement as to composition of Council.

April 26-May 1. Preparatory Committee for International Economic Conference met at Geneva. Second session held from Nov. 15-19.

May 10-18. Committee on Composition of Council held first session at Geneva. Second session held from Aug. 30-Sept. 3.

May 18-26. Preparatory Commission for Disarmament Conference held first session at Geneva. Further sessions held on Sept. 22 and 27. Sub-Commission A (Military, Naval and Air Questions) held sessions from May 28-July 6; from Aug. 2-Sept. 9; and from Sept. 27-Nov. 5. Joint Commission to advise on economic aspects held sessions from June 28-July 1; from Sept. 30-Oct. 5; and from Oct. 19-27.

June 7-10. Fortieth session of Council held at Geneva.

June 10. Brazilian Government sent telegram notifying its resignation from the Council and its intention to withdraw from the League.

Sept. 1-22. Conference of state signatories of Protocol of signature of statute of Permanent Court met at Geneva to consider American reservations. Final Act approved, recommending acceptance of first four reservations but not of fifth, and recognizing that adherence of United States under special conditions formulated by Senate would necessitate an agreement between United States and signatories of Protocol.

Sept. 2-7. Forty-first session of Council held at Geneva. On Sept. 4, Council approved report of Committee on Composition of Council and decided to appoint Germany a permanent member and increase to nine number of non-permanent seats.

Sept. 6-25. Seventh (ordinary) session of Assembly held in Geneva. Sept. 8, Germany admitted to membership of League. Council's resolution regarding allocation of seats approved. Sept. 25. Slavery Convention opened for signature.

Sept. 11. Spain gave preliminary notification of withdrawal from the League.

Sept. 16-20. Forty-second session of Council held at Geneva.

Dec. 6-11. Forty-third session of Council held at Geneva.

Liberia.

1926. Feb. 10. Arbitration convention with United States signed. Ratifications exchanged Sept. 27. (*U. S. Treaty Series No. 747.*)

Lithuania.

1926. Jan. 27. Regulations promulgated by Lithuanian Government providing for free traffic of timber down the Niemen.

Feb. 1. Railway agreement with Poland signed.

Sept. 28. Treaty of guarantee with U. S. S. R. signed at Moscow.

Nov. 1. Lithuanian Prime Minister made statement refusing to recognize the decision of Conference of Ambassadors of March 14, 1923, fixing the frontier between Lithuania and Poland (giving Vilna to Poland).

Locarno Pact.

1926. Sept. 14. Ratifications deposited at Geneva of Treaty of Mutual Guarantee between Great Britain, France, Germany, Italy and Belgium, initialled at Locarno on Oct. 16, 1925, and signed in London on Dec. 1, 1925. (*Cmd. 2764.*)

Mexico.

1926. Jan. 20. Mexican Aliens Law concerning ownership of land, mineral wealth and oil wells came into force. Jan. 28, United States Government sent note of protest on ground that law was retroactive and confiscatory. Further U. S. note sent on Feb. 6. Feb. 5, Great Britain sent similar note. Mexican Government replied to first U. S. note on Feb. 12, and to second on March 27, giving assurance that new law would not be retroactive. Further correspondence from July 31 to Nov. 17.

Jan. 25. Presidential decree issued withdrawing decree of June 30, 1924, suspending service of external debt and approving agreement of Oct. 23, 1924, with International Commission of Bankers regarding debt.

March 6. Mexico denounced as from Dec. 22, 1926, treaty of friendship, commerce and navigation with Great Britain of Nov. 7, 1888.

March 18. Ratifications exchanged of convention with United States of Dec. 23, 1925, regarding smuggling, navigation and fishing questions. (*L. N. T. S. XLVIII.*)

May 15. Papal Nuncio deported as result of dispute concerning treatment of Catholic clergy under Mexican constitution. Aug. 1, Government regulations for enforcing "Anti-clerical" provisions of constitution came into force. Enforcement of regulations accompanied by riots.

July 7. Ratifications exchanged of claims convention with Spain of Nov. 26, 1925.

Aug. 17. U. S. A. announced that policy of non-intervention in Mexico would be continued and policy of non-interference in conflict between Government and Catholic Church.

Dec. 28. British-Mexican claims convention ratified by Mexican Senate.

Dec. 31. New oil regulations came into force.

Morocco.

1926. April 9. Official announcement that French and Spanish Governments had decided to negotiate with Abdul-Karim.

April 18. Preliminary meeting between Rifi and French and Spanish delegations held at Camp Berteaux.

April 27. Conference between French, Spanish and Rifi delegates opened at Wajda. Conference broke down on May 6.

May 7. Franco-Spanish offensive began.

May 27. Abdul-Karim surrendered to French forces.

June 14-July 10. Franco-Spanish Conference held in Paris. Agreement signed July 13 for delimitation of French and Spanish zones; naval supervision of Moroccan coastline; and military and administrative co-operation on land.

Netherlands.

1926. Feb. 16. Ratifications exchanged with Norway of provisional air navigation agreement of Jan. 8, 1925. (*L. N. T. S. XLVI.*)

June 19. Agreement signed with Great Britain in Paris regarding sanitary control over Mecca pilgrims at Kameron Island. (*Cmd. 2741.*)

Aug. 25, 26. Ratifications exchanged of air navigation agreement and provisional air navigation convention with Switzerland of May 18, 1925.

Sept. 18. Ratifications exchanged of provisional air navigation convention with Sweden of Nov. 21, 1925.

Oct. 18. Ratifications exchanged of provisional air navigation convention with Poland of Nov. 4, 1925.

Nicaragua.

1926. Jan. 13. Nicaraguan Congress declared sentence of banishment for two years against Liberal Vice-President, Juan Batista Sacasa, who had fled country as result of coup on October 25, 1925, by Conservative leader and former President, Emiliano Chamorro.
- Jan. 14. Liberal President Carlos Solorzano resigned.
- Jan. 17. Emiliano Chamorro elected President by Congress. In accordance with previous decision, United States recognition withdrawn.
- May 2. Liberal revolutionaries captured towns of Bluefields and Rama on Atlantic coast, in attempt to oust Señor Chamorro from power.
- May 4. Government declared state of war and sent military force to Atlantic coast.
- Aug. 18. Troops mobilized to deal with fresh revolutionary outbreaks round Leon Chinandega and Corinto.
- Aug. 27. Nicaraguan Foreign Minister protested to League of Nations against alleged freebooting expedition carried out by Mexican warship in aid of revolutionaries. Nicaraguan telegram forwarded by Secretary-General to Mexican Government. Sept. 1, Mexican Government replied that Mexico had nothing to do with the League of Nations.
- Aug. 29. United States seamen and marines landed at Bluefields to protect foreign lives and property.
- Sept. 1. Battle between Government troops and revolutionaries near Cosequina, resulting in defeat of latter. Bombardment of El Bluff by revolutionaries began on Sept. 4.
- Sept. 12. American Chargé d'affaires at Managua received instructions to mediate between contending factions with a view to a truce.
- Sept. 15. United States President signed order prohibiting export of arms and munitions to Nicaragua.
- Sept. 23. Agreement for armistice for 15 days signed on U.S. cruiser. Peace conference held during October at Corinto between Liberal and Conservative leaders proved unsuccessful.
- Oct. 30. President Chamorro resigned.
- Nov. 11. Congress elected Señor Adolfo Diaz President.
- Nov. 15. President Diaz asked for support of United States with a view to reaching an agreement with Liberals and avoiding further alleged hostilities and invasions on part of Mexican Government.
- Nov. 17. President Diaz notified that United States recognized his Government.
- Nov. 26. Conference held on U. S. cruiser between U. S. representative and revolutionary leader.
- Dec. 2. Former Vice-President Juan B. Sacasa inaugurated "Constitutional President" of Nicaragua by revolutionaries at Puerto Cabezas. Dr. Sacasa's Government subsequently recognized by Mexico.
- Dec. 8. Government of Guatemala in note to Sacasa Government offered to mediate between it and Diaz Government. Latter Government declined offer on Dec. 19.
- Dec. 11. Manifesto issued by President Diaz accusing Mexican Government of aiding Liberal revolutionaries. Dr. Sacasa denied on Dec. 14 that he was receiving Mexican support.
- Dec. 18. Salvador recognized Diaz Government.
- Dec. 23. President Diaz again asked for U. S. intervention. U. S. marines landed at Rio Grande Bar and at Puerto Cabezas; neutral zone comprising territory lying within rifle fire of American foreign properties established at Puerto Cabezas.
- Dec. 25. Dr. Sacasa's representative in Washington protested that landing of marines at Puerto Cabezas constituted armed intervention.

Norway.

1926. Feb. 17. Ratifications exchanged of treaty of friendship with Turkey of May 2, 1925.
- March 3. Ratifications exchanged of treaty of friendship, commerce and navigation with U. S. S. R. of Dec. 15, 1925. (*L. N. T. S. XLVII.*)
- April 9. Declaration signed at Oslo with U. S. S. R. concerning reciprocal recognition of tonnage measurement certificates. (*L. N. T. S. XLVIII.*)

- May 26. Convention with Great Britain for reciprocal communication of particulars concerning lunatics concluded by exchange of notes of June 2, 1924, and May 26, 1926.
- July 8. Ratifications exchanged of conciliation treaty with Switzerland of August 21, 1925.
- Aug. 11. Provisional commercial agreement concluded with Turkey by exchange of notes at Angora on Feb. 11 and Aug. 11, 1926. (*L. N. T. S. XLVII.*)
- Oct. 15. Notes exchanged with Spain at Madrid regarding commercial convention of Oct. 7, 1922.

Palestine.

1926. Feb. 2. Treaty of friendship with Syria signed.
- March 13. Agreement with Syria regarding importation of antiquities signed.
- March 30. Agreement with Syria signed regarding division between respective Governments of proceeds of taxes on animals.
- March 30. General strike of Arabs in Palestine as protest against French administration in Syria.

Panama.

1926. July 28. Treaty with United States signed at Washington, defining relations between the two countries and replacing the Taft Agreement.

Paraguay.

1926. Feb. 19. Paraguay denounced as from Feb. 19, 1927, clause 3 of peace treaty with Spain of Sept. 10, 1880.

Permanent Court of International Justice.

1926. Feb. 2–May 25. Tenth (extraordinary) session held at the Hague. May 25, Judgment given in cases of certain German interests in Upper Silesia.
- June 15–July 31. Eleventh (ordinary) session held at The Hague. Advisory opinion delivered on July 23 on question regarding competence of International Labour Organization in connexion with drawing up labour legislation. On July 31, Rules of Court, as amended during this session, came into force.

Persia.

1926. April 22. Treaty of neutrality for five years with Turkey signed at Teheran.

Poland.

1926. Jan. 31. Polish-Soviet Chamber of Commerce opened in Warsaw.
- March 28. New treaty of alliance for five years with Rumania, replacing that of March 3, 1921, signed at Bucharest. (*T.* April 21, 1926.)
- April 1. Ratifications exchanged of consular agreement with Russia of July 18, 1924.
- May 12. Military revolt broke out in Warsaw led by Marshal Pilsudski. May 14. Members of Government fled; President Wojciechowski and Cabinet resigned; new Government organized by Marshal Pilsudski. May 31, Marshal Pilsudski elected President by National Assembly, but refused to accept election. June 1. Professor Mosiecki elected President. July 22, Bill modifying constitution and increasing power of President approved by Diet. Bill passed Senate on July 31. Laws promulgated on Aug. 5. Oct. 3, Marshal Pilsudski formed new Government with himself as Prime Minister.
- June 11. Ratifications exchanged of arbitration convention with Switzerland of March 7, 1925.
- July 8. Ratifications exchanged of air navigation agreement with Sweden of Oct. 1, 1925.
- Oct. 16. Treaty of friendship and arbitration treaty with Serb-Croat-Slovene Kingdom signed at Geneva.

Portugal.

1926. April 16. Ratifications exchanged of agreement with United States of September 5, 1923, renewing for five years arbitration convention of April 6, 1908.

May 28. Revolution started at Braga. May 29, Cabinet resigned. June 1, President Machado resigned; Military Government formed under General Gomez da Costa. General da Costa arrested on July 10 by order of General Camorna, and exiled to Azores on July 14.

June 22. Agreement signed at Cape Town by Portuguese and South African delegation regarding frontier between Angola and S.W. Africa. June 30, Agreement signed regarding development of hydraulic power at Ruacana waterfalls and utilization of flood waters of Kunene River.

Dec. 31. War debt of Portugal to Great Britain refunded.

Rumania.

1926. Feb. 3. Treaty of arbitration and conciliation with Switzerland signed in Berne. Ratifications exchanged Aug. 7, 1926.

June 13. Agreement prolonging for 3 years convention of defensive alliance with Serb-Croat-Slovene Kingdom of June 7, 1921, signed at Bucharest. Ratifications exchanged June 17.

Sept. 17. Treaty of friendship and collaboration with Italy signed.

Russia.

1926. June 11. British note to Soviet Government regarding money sent to Great Britain during general strike.

June 30. Ratifications exchanged of treaty of neutrality with Turkey of Dec. 17, 1925.

Aug. 23. Soviet Government recognized *de jure* by Uruguay.

Salvador.

1926. Feb. 22. Treaty of friendship, commerce and consular rights with United States signed at San Salvador.

Serb-Croat-Slovene Kingdom.

1926. Feb. 1. Ratifications exchanged of treaty of peace and friendship with Turkey of Oct. 28, 1925. Came into force Feb. 16.

May 3. Agreement signed at Washington for consolidation of debt to U. S. A.

June 18. Provisional commercial agreement with Great Britain concluded by exchange of notes.

Siam.

1926. Jan. 12. Ratifications exchanged of treaty of friendship, commerce, and navigation with France of Feb. 14, 1925.

March 13. Ratifications exchanged of treaty of friendship, commerce, and navigation with Denmark of Sept. 1, 1925. (*L. N. T. S.* XLVII.)

March 30. Ratifications exchanged of treaty signed with Great Britain on July 14, 1925, for revision of mutual treaty arrangements, with protocol concerning jurisdiction applicable in Siam to British subjects. (*Cmd.* 2642.)

July 16. Treaty of friendship, commerce, and navigation with Norway signed at Oslo.

July 31. Ratifications exchanged of treaty of friendship, commerce, and navigation with Portugal of Aug. 14, 1925.

Aug. 24. Ratifications exchanged of treaty of friendship, commerce, and navigation with the Netherlands of June 8, 1925.

Spain.

1926. Jan. 9. Judicial convention concluded with Switzerland by exchange of notes.

Feb. 10. Liquor smuggling treaty with United States signed at Washington.

April 20. Treaty with Switzerland for conciliation and judicial settlement of disputes signed at Madrid. (*F. F.*, June 23, 1926.)

Aug. 4. Declaration signed at Berne by which Swiss Government renounced capitulatory rights in Spanish Zone of Morocco. Notes exchanged providing for extension to Spanish Zone of Spanish-Swiss extradition treaty of Aug. 21, 1883.

Syria.

1926. Feb. 18. Agreement with Turkey initialled at Angora by M. de Jouvenel and Rushdi Bey, providing for rectification of Syro-Turkish frontier, arbitration,

neutrality, co-operation in putting down frontier raids, &c. Agreement signed by M. Sarraut and Rushdi Bey on May 30.

April 25. Suwayda captured by French troops.

May 7. Druse band invaded Damascus. May 8-9, Damascus bombarded by French artillery and aircraft.

June 3. Salkhad captured by French troops.

Dec. 30. Customs agreement with Turkey signed.

Tangier.

1926. Aug. 14. Marquis de Estella, Spanish Prime Minister, in interview with press, claimed inclusion of Tangier in Spanish Zone of Morocco.

Aug. 24. Spanish note to Italian Government regarding status of Tangier.

Aug. 26. Spanish notes to France, Great Britain, and Italy suggesting either incorporation of Tangier in Spanish Zone or Spanish mandate for Tangier. French and British replies presented on Sept. 1.

Sept. 17. Further Spanish note to France and Great Britain proposing preliminary discussions regarding admission of Italy under revised statute, and subsequent plenary conference of all Powers signatories of Algeciras Act.

Turkey.

1926. May 3. Agreement with U. S. S. R. modifying treaty of Moscow of March 16, 1921, signed at Moscow.

June 30. Ratifications exchanged of treaty of neutrality with U. S. S. R. of Dec. 17, 1925.

United States of America.

1926. Jan. 27. Senate of United States adopted resolution recommending adherence to Permanent Court subject to five reservations.

July 8. Ratifications exchanged of conventions of Feb. 10, 1925, with Great Britain regarding rights in former German colony of East Africa, Cameroons, and Togoland. (*Cmd.* 2729, 2730, 2731.)

July 27. Further agreement with Great Britain for prevention of liquor smuggling.

GENERAL INTERNATIONAL AGREEMENTS ¹

AERIAL NAVIGATION: Convention and Protocols—(1) Convention (Paris, Oct. 13, 1919); (2) Additional Protocol (Paris, May 1, 1920); (3) Protocol regarding modification of Art. 5 of 1919 Convention (London, Oct. 27, 1922); (4) Protocol amending Art. 34 (London, June 30, 1923).

Ratifications: France (4), Dec. 26, 1924; Greece (4), March 7, 1925; Italy (4), June 13, 1924; Japan (4), Aug. 4, 1925; Persia (4), Nov. 10, 1925; Portugal (4), March 15, 1926; Siam (4), July 7, 1925.

Accessions: Bulgaria (4), May 9, 1924; Czechoslovakia (4), Feb. 17, 1925.

ALCOHOLIC LIQUORS: Suppression of Contraband Traffic in—(1) Convention (Helsingfors, Aug. 19, 1925); (2) Additional Protocol (Moscow, April 22, 1926).

Signatures: Danzig (1); Denmark (1); Estonia (1), (2); Finland (1), (2); Germany (1); Latvia (1); Lithuania (1); Norway (1); Poland (1); Sweden (1); U. S. S. R. (1), (2).

Ratifications: Estonia (1), June 29, 1926; Latvia (1), June 30, 1926.

ARBITRATION CLAUSES: Recognition of Validity in Commercial Matters—Protocol (Geneva, Sept. 24, 1923.)

Signature: New Zealand, March 11, 1926.

Ratifications: Greece, May 26, 1926; New Zealand, June 9, 1926; Spain, July 29, 1926.

Accessions: Great Britain, for certain colonies and possessions, March 12, 1926; Iraq, March 12, 1926; Palestine, March 12, 1926; Saint Helena, July 29, 1926; Tanganyika, June 17, 1926.

¹ The place and date of signature are given in brackets.

ARMS AND AMMUNITION : Convention and Protocols (Geneva, June 17, 1925.) (1) Convention for the supervision of the international trade in arms and ammunition and instruments of war ; (2) Statement regarding the Territory of Ifni ; (3) Protocol for the prohibition of the use in war of asphyxiating, poisonous or other gases and of bacteriological methods of war ; (4) Protocol of signature ; (5) Final Act.

Signatures : Belgium (1-3), June 25, 1926 ; Bulgaria (1-5), March 12, 1926 ; Denmark (1), (2), (5), Aug. 9, 1926 ; Netherlands (1-2), April 29, 1926 ; Sweden (1), March 8, 1926, (3), Dec. 7, 1925 ; Switzerland, (1), (2), (5), June 29, 1926 ; Venezuela (1), (4), (5), March 10, 1926, (2), (3), April 23, 1926.

COMMUNICATIONS AND TRANSIT : Conventions (Geneva, Dec. 9, 1923.) (1) International régime of railways (convention, statute, and protocol of signature) ; (2) International régime of maritime ports (convention, statute, and protocol of signature) ; (3) Transmission in transit of electric power (convention, statute, and protocol of signature) ; (4) Development of hydraulic power affecting more than one state (convention and protocol of signature).

Ratifications : Denmark (1-4), April 27, 1926 ; Norway (1), Feb. 24, 1926 ; Rumania (1), Dec. 23, 1925.

CUSTOMS FORMALITIES : Convention (Geneva, Nov. 3, 1923).

Ratifications : China, Feb. 23, 1926 ; Hungary, Feb. 23, 1926 ; Morocco, Nov. 8, 1926 ; Rumania, Dec. 23, 1925 ; Sweden, Feb. 12, 1926 ; Tunis, Nov. 8, 1926.

CUSTOMS TARIFF : Publication—Convention (Brussels, July 5, 1890.)

Ratification : Sweden, Feb. 12, 1926.

DOCUMENTS : Exchange of—Conventions (Brussels, March 15, 1886.) (1) International exchange of official documents and scientific and literary publications ; (2) Exchange of the *Journal Officiel* and of parliamentary records and documents.

Accession : China (1-2), Dec. 22, 1925.

EPIZOOTIC OFFICE : Creation of—Convention (Paris, Jan. 25, 1924.)

Ratifications : France, June 11, 1926 ; Netherlands, Aug. 26, 1926 ; Portugal, May 20, 1926 ; Switzerland, July 6, 1926.

FOOD ANALYSIS : Conventions (Paris, Oct. 16, 1912.) (1) Unification and presentation of statistics ; (2) Creation of an international chemistry bureau.

Ratifications : Portugal (1), June 17, 1926 ; Uruguay (1).

Accession : Greece (1).

HAGUE CONVENTIONS : Accession to conventions on private international law by states not represented at the Hague Conferences of 1902 and 1905—Protocols (The Hague, Nov. 28, 1923, and July 4, 1924.)

Signature : Czechoslovakia, Oct. 20, 1926.

Accession : Sweden, July 9, 1926.

INDUSTRIAL PROPERTY : Protection—Convention (Paris, March 20, 1883 ; Revisions ; Brussels, Dec. 14, 1900 ; Washington, June 2, 1911.)

Accessions : New Guinea, Feb. 25, 1926 ; Papua, Feb. 25, 1926.

LABOUR : Draft Conventions (Washington, November, 1919.) (1) Limitation of hours of work ; (2) Unemployment ; (3) Employment of women before and after childbirth ; (4) Night work of young persons employed in industry ; (5) Minimum age for admission of children to industrial employment ; (6) Night work of women.

Ratifications : Japan (5), Aug. 7, 1926 ; Latvia (3-5), June 3, 1926.

— Draft Conventions (Genoa, June 15-July 10, 1920.) (1) Minimum age for admission of children to employment at sea ; (2) Unemployment indemnity in case of loss or foundering of the ship ; (3) Facilities for finding employment for seamen.

Ratifications : Canada (1-2), March 31, 1926 ; Great Britain (2), March 12, 1926 ; Latvia, (1), (3), June 3, 1926.

Accession : Latvia (2), Aug. 5, 1926.

LABOUR : Draft Conventions (Geneva, Oct. 25–Nov. 19, 1921.) (1) Minimum age for admission of children to employment in agriculture ; (2) Rights of association in agriculture ; (3) Workmen's compensation in agriculture ; (4) Use of white lead in painting ; (5) Application of the weekly rest in industry ; (6) Minimum age for admission of young persons to employment as trimmers and stokers ; (7) Compulsory medical examination of children and young persons employed at sea.

Ratifications : Belgium (2), (4–7), July 19, 1926 ; Canada (6), (7), March 31, 1926 ; France (4), Feb. 19, 1926 ; Great Britain (6–7), March 8, 1926.

— Amendment to Art. 393 of the Treaty of Versailles and to corresponding articles of other Treaties of Peace, adopted by the International Labour Conference at its fourth session (Geneva, Nov. 2, 1922.)

Ratifications : China, June 3, 1926 ; Estonia, April 12, 1926.

— Draft Conventions (Geneva, June, 1925.) (1) Workmen's compensation for accidents ; (2) Equality of treatment for national and foreign workers as regards workmen's compensation for accidents ; (3) Night work in bakeries.

Ratifications : Great Britain (2), Oct. 6, 1926 ; South Africa (1), March 30, 1926 ; Sweden (1–2), Sept. 8, 1926.

LEAGUE OF NATIONS : Amendments to Articles 4, 6, 12, 13, 15, 16, 26 of Covenant—Protocols (Geneva, Oct. 5, 1921.)

Ratifications : France (4), May 19, 1926 ; Spain (4), July 29, 1926.

— Amendment to Article 16 of the Covenant (Geneva, Sept. 27, 1924.)

Ratification : Netherlands, Feb. 8, 1926.

— Amendment to second paragraph of original text of Article 16 of the Covenant—Protocol (Geneva, Sept. 21, 1925.)

Signatures : Canada, March 11, 1926 ; Japan, Dec. 15, 1925 ; Salvador, Jan. 28, 1926 ; South Africa, March 8, 1926 ; Uruguay.

Ratification : Denmark, March 28, 1926.

LITERARY AND ARTISTIC WORKS : Protection of—Revised Convention (Berne, Nov. 13, 1908 ; Additional Protocol, March 20, 1914.)

Accession : Rumania, Sept. 3, 1926.

MARITIME LAW : Unification of certain rules—Conventions (Brussels, Aug. 25, 1924.) (1) Limitation of responsibility of ship-owners ; (2) Maritime privileges and mortgages ; (3) Recognition.

Signatures : Argentina (1–2), Aug. 24, 1925 ; Belgium (1–3), Sept. 8, 1924 ; Brazil (1–2), Dec. 29, 1924 ; Danzig (1–3), Aug. 22, 1925 ; Denmark (1), Aug. 24, 1925 ; France (1–3), Feb. 28, 1925 ; Germany (3), Aug. 24, 1925 ; Great Britain (1), (3), Nov. 15, 1924 ; Italy (1), (3), Sept. 17, 1925 ; Japan (1), (3), Aug. 25, 1925 ; Latvia (1), Oct. 27, 1925 ; Poland (1–3), Aug. 22, 1925 ; Rumania (1–3), March 12, 1925 ; Spain (1–3), Aug. 24, 1925 ; United States of America (3), June 23, 1925.

— Unification of certain rules—Conventions (Brussels, April 10, 1926.) (1) Immunity of state ships ; (2) Maritime privileges and mortgages.

Signatures : Belgium (1–2) ; Brazil (1–2) ; Denmark (1–2) ; France (1–2) ; Germany (1–2) ; Great Britain (1–2) ; Hungary (1–2) ; Italy (1–2) ; Mexico (1–2) ; Netherlands (1–2) ; Norway (1–2) ; Poland (1–2) ; Rumania (1–2) ; Serb-Croat-Slovene Kingdom (1–2) ; Spain (1–2) ; Sweden (1–2).

MATCHES : White Phosphorous—Convention (Berne, Sept. 26, 1906.)

Accessions : Bulgaria, Nov. 1, 1926 ; Irish Free State, April 15, 1926.

OBSCENE PUBLICATIONS : Repression—Convention (Paris, May 4, 1910.)

Ratification : Rumania, June 7, 1926.

— Convention (Geneva, Sept. 12, 1923.)

Ratifications : Belgium, July 31, 1926 ; China, Feb. 24, 1926 ; Danzig, March 31, 1926 ; India, Dec. 11, 1925 ; New Zealand, Dec. 11, 1925 ; Northern Ireland, Dec. 11, 1925 ; Rumania, June 7, 1926 ; South Africa, Dec. 11, 1925 ; Switzerland, Jan. 20, 1926.

Accessions : Canada, May 23, 1924 ; Great Britain, for certain colonies and possessions, Nov. 3, 1926 ; Newfoundland, Dec. 31, 1925 ; San Marino, April 21, 1926 ; Southern Rhodesia, Dec. 31, 1925 ; Tanganyika, Nov. 3, 1926.

OPIUM : First Conference—Agreement, Protocol, and Final Act (Geneva, Feb. 11, 1925.)
Ratifications : British Empire, Feb. 17, 1926 ; France, April 29, 1926.

— Second Conference—Convention, Protocol, and Final Act (Geneva, Feb. 19, 1925.)
Ratifications : Australia, Feb. 17, 1926 ; British Empire, Feb. 17, 1926 ; India, Feb. 17, 1926 ; New Zealand, Feb. 17, 1926 ; South Africa, Feb. 17, 1926 ; Sudan, Feb. 20, 1926.

Accessions : Danzig, Aug. 7, 1926 ; Egypt, March 16, 1926 ; Rumania, March 26, 1926 ; Salvador, March 11, 1926 ; San Marino, April 21, 1926 ; Sarawak, March 11, 1926.

PERMANENT COURT OF INTERNATIONAL JUSTICE : (Geneva, Dec. 16, 1920.) (1) Protocol of signature ; (2) Optional Clause.

Signatures : Sweden (2), March 8, 1926 ; Switzerland (2), March 1, 1926.

Ratifications : Belgium (2), March 10, 1926 ; Denmark (2), March 28, 1926 ; Irish Free State (1), Aug. 21, 1926 ; Switzerland (2), July 24, 1926.

Renewals : Denmark (2), Dec. 11, 1925 ; Netherlands (2), Sept. 2, 1926 ; Norway (2), Sept. 22, 1926.

Accession : Abyssinia (1-2), July 16, 1926.

PHYLOXERIC CONVENTION : Measures to be taken against the *Phylloxera Vastatrix*. (Nov. 3, 1881 ; Additional Convention, Berne, April 15, 1889.)

Accession : Czechoslovakia, Sept. 28, 1926.

POSTAL : Pan-American Conventions (Buenos Ayres, Sept. 15, 1921.) (1) Principal Convention ; (2) Parcel post ; (3) Money orders.

Ratifications : Chile (1-3), April 15, 1926 ; Haiti (2), June 1, 1926.

— Radio-Telegraph Convention—Revision (London, July 5, 1912.)

Accessions : Dominican Republic, Aug. 11, 1926 ; Saint-Pierre and Miquelon, May 13, 1926 ; Nicaragua, May 12, 1926 ; Surinam, Dec. 17, 1925 ; Syria and Lebanon, May 13, 1926 ; Turkey, Aug. 30, 1926.

— Universal Postal Union—Revised Conventions (Stockholm, Aug. 28, 1924.) (1) Universal Postal Convention ; (2) Letters, &c., of declared value ; (3) Parcel post ; (4) Postal orders ; (5) Postal transfers ; (6) Payment on delivery ; (7) Subscriptions to periodicals.

Ratifications : Dominican Republic (1), (3), Feb. 11, 1926 ; Haiti (1-3), Jan. 23, 1926 ; Japan, for dependencies (1-5), Jan. 22, 1926 ; South Africa (1), Dec. 7, 1925 ; Spain, for colonies (1), (3), Jan. 4, 1926 ; Syria and Lebanon (1-4), Dec. 30, 1925.

Accessions : Dominican Republic (4), Jan. 4, 1926 ; Iraq (2), April 1, 1926 ; Sarawak (2), July 1, 1926.

RED CROSS : Amelioration of the Lot of the Wounded and the Sick—Revised Convention (Geneva, July 6, 1906.)

Accessions : Dominican Republic, July 16, 1926 ; Iceland, March 25, 1926.

REFRIGERATION : International Institute of—Convention (Paris, June 21, 1920.)

Ratification : Morocco (French Zone), Jan. 25, 1926.

Accessions : Southern Rhodesia ; U. S. S. R.

REFUGEES : Certificates of Identity for Russian and Armenian Refugees—Arrangements modifying and completing those of July 5, 1922, and May 31, 1924. (Geneva, May 12, 1926.)

Signatures : Austria, Belgium, Bulgaria, Canada, Cuba, Denmark, Estonia, Finland, France, Germany, Great Britain, Greece, Hungary, India, Latvia, Norway, Poland, Rumania, Serb-Croat-Slovene Kingdom, South Africa, Sweden, Switzerland.

SANITARY CONVENTION—Revision (Paris, Jan. 17, 1912.)

Ratification : Czechoslovakia, April 8, 1926.

SLAVERY : Suppression of—Convention (Geneva, Sept. 25, 1926.)

Signatures : Abyssinia, Albania, Australia, Austria, Belgium, Canada, China, Cuba, Denmark, Estonia, Finland, Germany, Great Britain, Greece, India, Lithuania, Norway, Panama, Persia, Portugal, Rumania, Serb-Croat-Slovene Kingdom, Uruguay.

TANGIER : International Statute for—Convention (Paris, Dec. 18, 1923–Feb. 2, 1924.)

Accession : Portugal, Feb. 23, 1926.

VENEREAL DISEASE : Facilities to seamen for treatment of—Convention (Brussels, Dec. 1, 1924.)

Signatures : Argentina, Belgium, Cuba, Denmark, Finland, France, Great Britain, Greece, Italy, Monaco, Peru, Rumania, Sweden.

Ratifications : Finland, April 21, 1926 ; Great Britain, Aug. 21, 1925 ; Greece, May 18, 1926 ; Monaco, Dec. 17, 1925 ; New Zealand, Aug. 21, 1925.

Accession : Canada, Aug. 21, 1925.

WEIGHTS AND MEASURES : Revised Convention (Paris, Oct. 6, 1921.)

Ratifications : Portugal, June 17, 1926 ; Rumania, Feb. 11, 1926.

WHITE SLAVE TRADE : Traffic in Women and Children—Convention (Geneva, Sept. 30, 1921.)

Ratifications : China, Feb. 24, 1926 ; Japan, Dec. 15, 1925 ; Switzerland, Jan. 20, 1926.

Accession : France, Jan. 16, 1926.

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